# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1954

## No. 261

ELIZABETH R. GRANVILLE-SMITH, PETITIONER,

*vs.*

EDWARD GRANVILLE-SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

# SUPREME COURT OF THE UNITED STATES

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ELIZABETH R. GRANVILLE-SMITH, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

# IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN AT CHARLOTTE AMALIE

Civil No. 119—1953

ELIZABETH R. GRANVILLE-SMITH, Plaintiff,

vs.

EDWARD GRANVILLE-SMITH, Defendant

ACTION FOR DIVORCE

COMPLAINT—Filed March 16, 1953

Comes Now, the plaintiff, by Maas & Bailey, Esquires, her attorneys, and for her Complaint herein respectfully shows to the Court and alleges:

1. That plaintiff is a resident and inhabitant of this district and has been a resident and inhabitant thereof for more than six weeks prior to the commencement of this action;

2. That the defendant is not a resident or inhabitant of this district and his last known address is Scarsdale, N. Y.;

3. That the parties were married on September 28, 1929, at New York City, New York, and there are no children under twenty-one years of age;

4. That, from the inception of the marriage the parties found that they had no interests in common, the plaintiff being interested in a normal home and social life, in horses and riding, and being outgoing, gregarious and fond of people, and the defendant being introverted and interested solely in gardening, all to plaintiff's disappointment and unhappiness and the opening of a breach between them;

5. That the defendant made no effort to adapt himself to or to understand plaintiff's love for horses, and refused to accompany her to horseshows, and further would walk out of the room if the subject was mentioned, regardless of whether guests were present or not, all to plaintiff's dis-

[fol. 2] comfiture and resentment and the widening of the breach between them;

6. That the defendant constantly criticized plaintiff to friends of the parties, and would complain about her cooking and ridicule the way she ran the house or her taste in interior decorations, and no matter how hard the plaintiff tried to please the defendant she could never succeed, all to plaintiff's perplexity and puzzlement and the further widening of the breach between them;

7. That, as a means of showing his displeasure with and of punishing plaintiff, the defendant would give plaintiff the silent treatment, and, on one occasion, six months elapsed before defendant saw fit to speak to plaintiff, all to plaintiff's misery and unhappiness and the further widening of the breach between them;

8. That the defendant objected so vigorously to plaintiff's entertaining her friends in the marital home, and would go out and leave the house when he found them there, that these friends soon dropped plaintiff, and plaintiff ceased to invite her friends to the home of the parties, all to plaintiff's irritation and annoyance and the further widening of the breach between them;

9. That the defendant would come to the table directly from gardening without washing or changing his clothes, and neither remonstrances nor pleadings were of any avail in inducing him to change this disagreeable habit, all to plaintiff's vexation and frustration and the further widening of the breach between them;

10. That the defendant was never able to live within the budget of the parties, spending money high, wild and handsome, and consequently the parties were always in debt, all to plaintiff's worry and concern and the further widening of the breach between them;

11. That the plaintiff was not permitted to evince any interest in the defendant's business, and the subject was forbidden as a type of conversation, and further would allow plaintiff only a maximum of ten minutes in which to discuss her business problems with him, and on many occasions [fol. 3] would refuse to listen to her at all, all to plaintiff's hurt and depression and the further widening of the breach between them;

12. That, on those occasions when the defendant felt the need of advice he would scorn plaintiff's thoughts and com-

ments and would choose to take the advice of outsiders in preference to that of plaintiff, all to plaintiff's mortification and grief and the further widening of the breach between them;

13. That the defendant frequently drank to excess, as a result of which his behaviour in company would be embarrassing to plaintiff, all to plaintiff's discomfiture and humiliation and the further widening of the breach between them;

14. That the parties had no physical relations for several months prior to their separation, to the breakdown of all ties between them;

15. That the parties separated on or about August 5, 1952, and have not since lived together as husband and wife;

16. That, by reason of all of the foregoing, there exists between the parties a state of irreconcilable incompatibility without any fault on the part of the plaintiff;

Wherefore, plaint ff prays this Court for (1) a decree of divorce absolute, and (2) such other and further relief as to the Court may seem just and proper in the premises.

(S.) Elizabeth R. Granville-Smith, Plaintiff. (S.) Maas & Bailey, Attorneys for Plaintiff.

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[fol. 4] *Duly sworn to by Elizabeth R. Granville-Smith. Jurat omitted in printing.*

---

[fol. 5] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

**[Title omitted]**

**AFFIDAVIT**

I, Elizabeth R. Granville-Smith, the plaintiff in the above entitled action, do hereby depose and state:

1. That to the best of my knowledge my husband, Edward Granville-Smith, the defendant herein, is not residing in this district.

2. That his last address known to me is Scarsdale, N. Y.

Dated: March 16, 1953.

(S.) Elizabeth R. Granville-Smith.

Subscribed and sworn to before me by the aforesaid Elizabeth R. Granville-Smith on this 16th day of March A. D. 1953. (S.) G. de Castro, Notary Public.

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[fol. 6] In the District Court of the Virgin Islands

[Title omitted]

Motion for Service Outside the Jurisdiction—March 16, 1953

Comes Now, the plaintiff, by her attorneys, Maas & Bailey, Esquires, and respectfully shows the Court:

That defendant does not reside in this district, being a resident of Scarsdale, N. Y.

Wherefore, it is respectfully requested that the Court grant an order directing service of process by publication in the district or personally at the place of his residence.

Dated: March 16, 1953.

(S.) Maas & Bailey, Attorneys for Plaintiff.

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[fol. 7] In the District Court of the Virgin Islands

[Title omitted]

Order Granting Service Outside the Jurisdiction—March 16, 1953

Upon reading and filing the verified complaint in the above entitled action and motion of plaintiff's attorneys requesting that the Court grant an order directing service of process by publication in the district or personally at the place of defendant's residence; and

It appearing to the satisfaction of the Court that defendant does not reside within the jurisdiction, it is hereby

Ordered that service of process on defendant herein may be made by publication of summons herein in the Daily News newspaper, St. Thomas, Virgin Islands, once a week for four consecutive weeks and by mailing a copy of the summons and complaint herein, and of this order, to the defendant at his last known address, or by effecting personal service thereof on defendant outside the jurisdiction.

In witness whereof, I have hereunto set my hand and the seal of the Court on this 16th day of March, A. D. 1953.

(S.) George A. Mena, District Court Commissioner.

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[fol. 8] In the District Court of the Virgin Islands

[Title omitted]

Summons

The President of the United States:

To Edward Granville-Smith, Scarsdale, N. Y., Defendant:

Within the time limited by law (see note below) you are hereby required to appear before this Court and answer to a complaint filed against you in this action; and in case of your failure to appear or answer, judgment by default will be taken against you as demanded in the complaint, for divorce.

Witness my hand and the Seal of the Court this 16th day of March, 1953.

(S.) George A. Mena (Clerk of the Court).

Maas and Bailey, Attorneys and Counselors at Law, P. O. Box 509 Charlotte Amalie, St. Thomas, Virgin Islands.

Note: The defendant, if served personally, is required to file his answer or other defense with the Clerk of this Court and to serve a copy thereof upon the plaintiff's attorney within twenty (20) days after service of this summons, excluding the date of service. The defendant, if served by publication or by personal service outside of the jurisdiction, is required to file his answer or other defense with the Clerk of this Court, and to serve a copy thereof upon the attorney for the plaintiff within thirty (30) days after the completion of the period of publication or personal service outside of the jurisdiction.

[fol. 9] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

APPEARANCE AND ANSWER—Filed March 19, 1953

Comes now Edward Granville-Smith, the defendant, by Warren H. Young, Esq., his attorney, appears and waives service of summons in this action for divorce, acknowledges receipt of a copy of the complaint filed herein and for his answer thereto, alleges:

1. For lack of sufficient knowledge and information upon which to form a belief as to the allegation contained in paragraph 1 of the complaint, he denies said allegation.
2. He admits the allegations contained in paragraphs 2 and 3 of the complaint.
3. He denies all other allegations of the complaint.

(S.) Edward Granville-Smith, Warren H. Young, Esq., Attorney for defendant.

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[fol. 10] *Duly sworn to by Edward Granville-Smith. Jurat omitted in printing.*

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[fol. 11] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

WAIVER AND CONSENT—Filed March 19, 1953

Comes now Edward Granville-Smith, defendant, by Warren H. Young, Esq., his attorney, and offers no objection to the immediate hearing of the application of the plaintiff without further notice to the defendant and consents and agrees to the hearing of this cause as if by default, but being represented at such hearing by his attorney, and consents to the making and entry of such findings of fact and conclusions of law and decree as to the Court may seem just and reasonable.

(S.) Edward Granville-Smith.

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*Duly sworn to by Edward Granville-Smith. Jurat omitted in printing.*

[fol. 12] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

RETAINER AND POWER OF ATTORNEY—March 17, 1953

Know All Men by these Presents:

That I, Edward Granville-Smith, of Scarsdale, New York, hereby retain and authorize Warren H. Young, Esq., of Christiansted, St. Croix, Virgin Islands, to appear in my behalf and represent me in the above entitled action; and by these presents, I do make, constitute and appoint the said Warren H. Young, Esq., my true and lawful attorney at law and in fact, to act for me and represent me in any suit for divorce which may be brought against me in the Virgin Islands by my wife, Elizabeth R. Granville-Smith, with full power and authority to do any and all acts and things that may be exercised and done by an attorney with full power of substitution, including the authority to accept service of summons and complaint and other process in my behalf, to demur, answer, or otherwise plead to the complaint or any amended complaint, and to waive time for service thereof, and the filing of findings of fact and conclusions of law and decree, as in the judgment of my said attorney, may be best and as fully to all intents and purposes as I could do if I were present personally.

In witness whereof, I have hereunto set my hand this 17th day of March, 1953.

(S.) Edward Granville-Smith.

[fol. 13] STATE OF NEW YORK,
County of New York, ss:

On this 17th day of March, 1953, before me the undersigned, a Notary Public, personally appeared Edward Granville-Smith, known to me to be the person described in and who executed the above and foregoing instrument, and he acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein stated.

In witness whereof, I have hereunto set my hand and

affixed my official seal the day and year herein first above written.

(S.) Katherine S. Crawshaw, Notary Public. Notary Public in the State of N. Y. Qualified in Kings County. No. 24-5853650. Cert. filed in N. Y. & Kings. Comm. expire 3/30/54.

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[fol. 14] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

TRANSCRIPT OF TESTIMONY—March 20, 1953

Elizabeth R. Granville-Smith, called as a witness in her own behalf, appeared before the District Court Commissioner and, after being duly sworn on oath, testified as follows:

Direct examination.

Mr. Bailey:

Q. What is your name?

A. Elizabeth R. Granville-Smith.

Q. Are you the plaintiff in this action for a divorce against your husband, Edward Granville-Smith?

A. I am.

Q. Are you a resident and an inhabitant of the Virgin Islands?

A. Yes, I am.

Q. Have you been a resident and an inhabitant of the Virgin Islands for more than six weeks prior to the commencement of this action?

A. Yes, I have.

Q. When did you become a resident and an inhabitant of the Virgin Islands?

A. February 1, 1953.

Q. Have you been a resident and an inhabitant of the Virgin Islands continuously and continually ever since?

A. I have.

[fol. 15] Q. During that time have you at any time or for any reason ever left the Virgin Islands?

A. No, I have not.

Q. Now, except for this action for a divorce, is there any other action of a marital nature pending anywhere else between you and your husband?

A. No, there is not.

Q. Where does he presently reside?

A. Scarsdale, New York.

Q. When and where were you married?

A. New York City, on September 28, 1929.

Q. Are there any children under twenty-one years of age?

A. No, there are none.

* * * * * * *

Q. Now, in this action, if a divorce is granted, are you asking for any alimony?

A. No, I am not.

Q. And you understand that by not asking for it at this time you may not ask for it at any future time?

A. I do.

Mr. Bailey: Do you have any questions, Mr. Young?

Mr. Young: I have no questions, Mr. Bailey.

Mr. Bailey: That is our case.

* * * * * * *

The Commissioner: Let the record show that the plaintiff appears personally and is represented by Maas and Bailey, Attorney Bailey of counsel; that the defendant did not appear personally, but was represented by Attorney Warren H. Young who filed his Retainer and Power of Attorney, as well as the defendant's Waiver and Consent, Appearance and Answer in which Answer he admits the allegations contained in paragraphs 2 and 3 of the complaint and denies all other allegations of the complaint. A divorce will be recommended.

Dated at Charlotte Amalie, Saint Thomas, Virgin Islands, this 20th day of March, 1953, and certified to be a true and correct Transcript of the Testimony in the above-entitled case.

(S.) Leon A. Mawson, Official Court Reporter.

[fol. 16] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT COMMISSIONER—March 20, 1953

This matter having come on to be heard this 20th day of March, 1953, and the plaintiff having appeared in person and by her attorneys, Maas & Bailey, Esquires, (William W. Bailey, Esquire, of counsel), and the defendant appearing generally by filing his verified Waiver and Consent and his verified Appearance and Answer, and being represented by his attorney Warren H. Young, Esquire, who filed his verified Retainer and Power of Attorney, and the Court having jurisdiction of the parties and of the cause of action, and the matter having been referred to the District Court Commissioner to hear and report, pursuant to statute, and after hearing all of the evidence adduced on behalf of the plaintiff and after hearing the plaintiff testify under oath, and considering all of the evidence submitted and after due deliberation thereon, I find as follows:

FINDINGS OF FACT

That the plaintiff is and has been a bona fide resident and inhabitant of this district for more than six weeks prior to the commencement of this action; that the parties were married on the 28th day of September, 1929, at New York City, N. Y., and there are no children under twenty-one years of age; that a state of incompatibility of temperament exists between the parties through no fault of the plaintiff;

[fols. 17-19] CONCLUSIONS OF LAW

That I conclude as a matter of law that a state of incompatibility of temperament exists between the parties, which entitles the plaintiff to a decree of divorce absolute;

In Witness Whereof, I have hereunto set my hand and caused the seal of the Court to be affixed this 20th day of March, A.D., 1953.

(S.) George A. Mena, District Court Commissioner.

[fol. 20] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

MOTION FOR DECREE—June 21, 1954

Comes now plaintiff, by her substituted attorneys, Dudley, Hoffman & McGowan, and respectfully shows to the Court:

That hitherto, March 16, 1953, plaintiff filed her petition for a decree of divorce from the defendant herein on the ground of incompatibility of temperament;

That thereafter, March 19, 1953, defendant appeared generally by filing his verified Appearance and Answer, and verified Waiver and Consent to the immediate hearing of plaintiff's application;

That thereafter and on March 20, 1953 plaintiff's application was heard by the District Court Commissioner, at which hearing defendant was represented by his attorney, Warren H. Young, Esq. who filed his verified Retainer and Power of Attorney;

That thereafter the District Court Commissioner recommended in his Findings of Fact and Conclusions of Law, dated March 20, 1953, that plaintiff's application be granted.

That notwithstanding said recommendation said decree has not been granted;

Wherefore, plaintiff respectfully requests that a decree [fol. 21] of divorce be issued to plaintiff in accordance with the Findings of Fact and Conclusions of Law heretofore filed by the District Court Commissioner in the within action.

Dated, Charlotte Amalie, V. I., June 21, 1954.

(S.) Louis Hoffman, Dudley, Hoffman & McGowan, Attorneys for Plaintiff, Office and P. O. Address: Charlotte Amalie, V. I.

[fol. 22] IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

[Title omitted]

**Transcript of Appearance on Motion**—June 21, 1954

APPEARANCES:

Louis Hoffman, Esq., Attorney for Plaintiff.
Warren H. Young, Esq., Attorney for Defendant.

Mr. Hoffman: If your Honor please, this is a motion for the confirmation of the recommendation made by the District Court Commissioner in the matter of Granville-Smith v. Granville-Smith, Civil No. 119-1953, in which a Decree of Divorce was recommended. This matter was heard on the 20th day of March, 1953, and the Findings of Fact and Conclusions of Law executed by the Commissioner on the 20th day of March, 1953.

The Court: I have looked at the Transcript of the Record herein and I would like to ask whether you have any more evidence to offer on the question of domicile.

Mr. Hoffman: No, sir.

[fols. 23-36] The Court: It is my opinion, after examining the record that the proof herein is not sufficient to establish domicile in accordance with the directive of the case of Burch v. Burch, decided by the Court of Appeals of this Circuit.

Mr. Hoffman: We respectfully call attention to Sec. 9a of the Divorce Ordinance amended May 29, 1953 which makes six weeks' residence on the part of the plaintiff prior to the filing of the complaint prima facie evidence of domicile.

The Court: I have seen that new statute, Mr. Hoffman, and I doubt that it is sufficient to confer jurisdiction on this Court to grant this divorce and so rule.

Mr. Hoffman: We respectfully except, if your Honor please, and hereby serve notice of appeal to the United States Court of Appeals for the Third Circuit.

The Court: Very well, I think this is a very important question. I do not know whether the Court of Appeals can hear it immediately or not, but if you wish me to, I will certify its importance to the Court of Appeals so that you may get some determination on it as soon as possible.

The Court: Let the record show then that this Court does certify this matter to the Court of Appeals as being a matter of importance and urgency.

Dated at Charlotte Amalie, St. Thomas, Virgin Islands, this 21st day of June, 1954, and certified to be a true and correct transcript of the Record in the above entitled case.

(S.) Leon A. Mawson, Official Court Reporter.

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[fol. 37] In the District Court of the Virgin Islands

Civil No. 119—1953

Elizabeth R. Granville-Smith, Plaintiff,

vs.

Edward Granville-Smith, Defendant

Action for Divorce

Order Denying Motion for Decree and Dismissing Cause—June 21, 1954

This matter came on for hearing June 21, 1954 on the Motion of Dudley, Hoffman & McGowan, substituted attorneys for plaintiff, requesting confirmation of Findings of Fact and Conclusions of Law heretofore filed herein by George A. Mena, District Court Commissioner, the 20th day of March, 1953, recommending the granting of a decree of divorce to plaintiff from defendant, on the ground of Incompatibility of Temperament.

Plaintiff appeared by her attorneys, Dudley, Hoffman & McGowan (Louis Hoffman, Esq., of counsel).

Defendant appeared by his attorney, Warren H. Young, Esq.

After hearing the argument of counsel on the Motion, the Court being satisfied in the premises, and on the basis of opinion heretofore rendered June 13, 1953 in the matter of *Alton* v. *Alton*, Civil No. 145-1953, it is hereby

Ordered, that said Motion be and the same is hereby denied, and the Complaint herein dismissed for lack of jurisdiction over the plaintiff herein.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Court to be affixed this 21st day of June, 1954.

(S.) Herman E. Moore, Judge.

Attest: (S.) George A. Mena, Clerk.

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[fols. 38-43] In the District Court of the Virgin Islands

[Title omitted]

Notice of Appeal—June 21, 1954

To George A. Mena, Esq., Clerk of the District Court; Warren H. Young, Esq., Attorney for Defendant:

Notice Is Hereby Given that Elizabeth R. Granville-Smith, plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the District Court, dated June 21, 1954, entered herein, dismissing the complaint herein for lack of jurisdiction.

Dated, Charlotte Amalie, V. I., June 21, 1954.

(S.) Louis Hoffman, Dudley, Hoffman & McGowan, Attorneys for Plaintiff, Office and P. O. Address: Charlotte Amalie, V. I.

Proof of Service—(Omitted in Printing)

[fol. 44] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,354

ELIZABETH R. GRANVILLE-SMITH, Appellant,

v.

EDWARD GRANVILLE-SMITH

Appeal from the District Court of the Virgin Islands, Division of St. Thomas and St. John

Submitted June 25, 1954

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed July 13, 1954

Per CURIAM:

This case is the same with regard to all operative facts and principles of law as Alton v. Alton, 207 F. 2d 667 (C. A. 3, 1953), cert. granted, 347 U. S. 911 (1954); proceedings dismissed because moot, June 1, 1954. That decision must govern this. While individual members of the Court have not modified their views as set out in the opinions in that [fol. 45] case, all recognize the authority of a decision rendered after due consideration by the Court en banc.

The judgment of the district court will be affirmed.

[fol. 46] In United States Court of Appeals for the Third Circuit

No. 11,354

Elizabeth R. Granville-Smith, Appellant,

vs.

Edward Granville-Smith

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

Judgment—July 13, 1954

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was submitted on brief.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Harriet G. Humphrys, Deputy Clerk.

July 13, 1954.

[File endorsement omitted.]

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[fols. 47-49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 261

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8184)

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IN THE

# Supreme Court of the United States

October Term, 1954

No. 261

ELIZABETH B. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*Of Counsel*

August, 1954

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

October Term, 1954

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No.

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ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*To the Honorable the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:*

Comes now the Petitioner, Elizabeth R. Granville-Smith, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 13, 1954. This petition presents precisely the same question that was before this Court in the October, 1953, Term in No. 531, *Alton* v. *Alton*, dismissed as moot after certiorari had been granted and the case had been orally argued, 347 U.S. 610.

### OPINIONS BELOW

The District Court rendered no opinion. Its judgment is annexed hereto as Appendix C. The opinion of the Court of Appeals is not yet reported; it is annexed hereto as

Appendix A. The Court of Appeals sitting *en banc* affirmed the judgment of the District Court, which dismissed the complaint, on the grounds that "This case is the same with regard to all operative facts and principles of law as *Alton* v. *Alton*, 207 F. 2d 667 (C.A. 3, 1953)." The Court of Appeals concluded in a *per curiam* opinion that its decision in *Alton* "must govern this [case]" because "individual members of the Court have not modified their views as set out" in *Alton*.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from making plaintiff's residence within its borders for six weeks prima facie evidence of domicile in a proceeding for divorce?

2. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from providing that upon proof of six weeks residence of a complaining party in a divorce action where the defendant has been personally served within the district or enters a general appearance, the court shall have jurisdiction of the action without further reference to domicile?

## STATUTE INVOLVED

Sections 8, 9 and 9(a) of the Divorce Law of the Virgin Islands[1] read as follows (Section 9(a) is in issue here):

> "Section 8. When a marriage has been solemnized in the district an action may be maintained to declare

---

[1] Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, as amended by Act, approved May 29, 1953 (Bill No. 55, 17th Legis. Ass. of the V.I.)

it void if the plaintiff is an inhabitant of the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has been an inhabitant thereof for six weeks prior to the commencement of the action.

"Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plaintiff therein must be an inhabitant of the district at the commencement of the action and for six weeks prior thereto, which residence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose.

"(a) Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

Section 17 thereof reads as follows:

"Should any section of this law or part thereof be declared invalid by a Court of competent jurisdiction, said declaration shall not invalidate the remainder of this law."

## STATEMENT

Petitioner brought this suit for divorce in the District Court of the Virgin Islands at Charlotte Amalie, St. Thomas, on March 16, 1953 (R. 1A).* Jurisdiction over

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* Record citations are to the "Appendix on Behalf of Appellant" in the Court below, a copy of which has been certified to this Court.

divorce actions is vested in the District Court by 48 U.S.C. § 1406(4).

Petitioner's verified complaint alleged that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks prior to the commencement of the action; that Respondent was not a resident of the Virgin Islands and that his last known address was Scarsdale, New York; that the parties were married on September 28, 1929, at New York City, New York; and that there are no children of the marriage under twenty-one years of age (R. 1A). This was followed by a detailed statement of facts on the basis of which a "state of irreconcilable incompatibility"[2] was alleged to exist between the parties. The complaint prayed for a decree of absolute divorce. It did not ask for any relief relating to alimony or property.

Respondent entered an appearance and waived service of summons (R. 9A). He filed an answer in which he alleged lack of sufficient knowledge and information upon which to form a belief as to Plaintiff's allegation that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks (*Ibid*). He admitted the allegations in the complaint concerning his residence, the date and place of the marriage, and the absence of children under twenty-one (*Ibid*). He denied all of the other allegations. Respondent simultaneously filed a "Waiver and Consent" in which he stated that he had no objection to an immediate hearing and he consented to "the making and entering of such findings of fact and conclusions of law and decree as to the Court may seem just and reasonable" (R. 11A).

Testimony was thereafter taken before a Commissioner (R. 14A). Petitioner testified that she had become a resi-

---

[2] "Incompatibility of temperament" constitutes ground for divorce in the Virgin Islands. Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, § 7(8). See *Burch* v. *Burch*, 195 F. 2d 799, 806-807 (C.A. 3, 1952).

dent and inhabitant of the Virgin Islands on February 1, 1953 (*Ibid*). Testimony was also taken in support of other allegations in the complaint. Both parties were represented by counsel. No testimony was offered in behalf of Respondent.

On March 20, 1953, the Commissioner filed findings of fact which included, among others, a finding that Plaintiff was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks prior to commencement of the action (R. 16A). He concluded as a matter of law that a "state of incompatibility of temperament exists between the parties which entitles the Plaintiff to a decree of divorce absolute" (R. 17A).

No action having been taken by the Court, counsel for Petitioner moved on June 21, 1954, to confirm the Commissioner's report (R. 20A). At a hearing on the motion, the Court inquired of counsel of Petitioner "whether you have any more evidence to offer on the question of domicile" (R. 22A). Petitioner's counsel said he had none, and directed the attention of the Court to Section 9(a) of the Virgin Island divorce law, p. 3, *supra*. The Court ruled that Section 9(a) was not "sufficient to confer jurisdiction on this Court to grant this divorce" (R. 23A). On June 21, 1954, the Court entered an order (annexed hereto as Appendix C), dismissing the complaint on the sole ground that the Court lacked jurisdiction. The Court relied on the opinion it had rendered in *Alton* v. *Alton* on June 3, 1953.[3]

On appeal, the Court of Appeals considered the matter *en banc*. It affirmed the judgment of the District Court *per curiam* on the basis of its opinion in *Alton* v. *Alton*, 207 F. 2d 667 (C.A. 3, 1953). In *Alton* v. *Alton*, the Court of Appeals concluded by a vote of 4 to 3 that (a) the first provision in Section 9(a) creating a rebuttable presump-

[3] The opinion of the District Court in *Alton* v. *Alton* is not reported. It is reprinted in the Transcript of Record filed with this Court in *Alton* v. *Alton* at pp. 12-26.

tion of domicile on the basis of six weeks presence was unconstitutional because there was no "rational connection" between six weeks presence and domicile, and that (b) the second provision in the statute, providing that where the Defendant is before the Court the case shall proceed without further reference to domicile, violated the due process clause of the Fifth Amendment. The Court of Appeals concluded here that its decision in *Alton* v. *Alton* "must govern this [case]" since "individual members of the Court have not codified their views as set out in the opinions in that case."

## REASONS FOR GRANTING THE WRIT

This petition presents precisely the same issues raised but not resolved at the October, 1953, Term by No. 531, *Alton* v. *Alton*, dismissed as moot after certiorari had been granted and the case had been orally argued, 347 U.S. 610. As the Court of Appeals put it, "this case is the same with regard to all operative facts and principles of law as *Alton* v. *Alton*." We accordingly incorporate herewith by reference the "Petition for a Writ of Certiorari" and the "Brief for the Petitioner" filed in *Alton* v. *Alton*.

In reaffirming their decisions in *Alton* v. *Alton*, the Courts below have decided basic questions concerning the constitutional power of state and territorial legislatures to regulate the mode of proof and jurisdictional standards in divorce litigation, a domain of law traditionally confided to the states. Those questions were deemed important by this Court when certiorari was granted last term in *Alton* v. *Alton*. They are still important.[4] The very same consid-

[4] The importance of the underlying issues is reflected by the widespread discussion in the professional journals precipitated by *Alton* v. *Alton*. See comments and notes 39 Cornell L.Q. 293 (1954); 54 Col. L. Rev. 415 (1954); 67 Harv. L. Rev. 516 (1954); 34 Boston U.L. Rev. 216 (1954); 42 Georgetown L. J. 450 (1954); 22 George Washington L. Rev. 356 (1954); 5 Hastings L. J. 246 (1954); 32 Texas L. Rev. 610 (1954); 23 U. of Cin. L. Rev. 266 (1954).

erations which prompted the Court to issue certiorari in *Alton* warrant grant of the writ here.

## CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

The issues presented have already been canvassed in the briefs and oral argument in *Alton* v. *Alton*. In order to avoid unnecessarily burdening the Court and to facilitate an early disposition of the cause,[5] Petitioner is willing to submit her case for decision on the merits on the basis of the briefs and argument in *Alton*.

Respectfully submitted,

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*Of Counsel*

August, 1954

[5] The Clerk of the Virgin Islands District Court reported to the Administrator of the Federal Courts on April 2, 1954, that as of March 31, 1954, decision in forty-eight cases had been held in abeyance pending decision of the issue presented by *Alton* v. *Alton*. Since that report was submitted additional cases have been filed and are now waiting disposition of this appeal by this Court.

## APPENDIX A

### Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,354

ELIZABETH R. GRANVILLE-SMITH, *Appellant*

v.

EDWARD GRANVILLE-SMITH, *Appellee*

Appeal From the District Court of the Virgin Islands, Division of St. Thomas and St. John

Submitted June 25, 1954

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges

### Opinion of the Court

(Filed July 13, 1954)

Per Curiam

This case is the same with regard to all operative facts and principles of law as Alton v. Alton, 207 F. 2d 667 (C.A. 3, 1953), cert. granted, 347 U.S. 911 (1954); proceedings dismissed because moot, June 1, 1954. That decision must govern this. While individual members of the Court have not modified their views as set out in the opinions in that case, all recognize the authority of a decision rendered after due consideration by the Court en banc.

The judgment of the district court will be affirmed.

A true Copy:

Teste:
Clerk of the United States Court of Appeals for the Third Circuit.

## APPENDIX B

### Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 11,354

---

ELIZABETH R. GRANVILLE-SMITH, *Appellant*

v.

EDWARD GRANVILLE-SMITH, *Appellee*

---

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

---

**Judgment**

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was submitted on brief.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

HARRIET G. HUMPHRYS
*Deputy Clerk*

July 13, 1954

RECEIVED & FILED

JUL 13, 1954

IDA O. CRESKOFF
*Clerk*

## APPENDIX C

### Judgment of the District Court

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN AT CHARLOTTE AMALIE

CIVIL NO. 119—1953

ACTION FOR DIVORCE

ELIZABETH R. GRANVILLE-SMITH, *Plaintiff*,

vs.

EDWARD GRANVILLE-SMITH, *Defendant*.

### Order

This matter came on for hearing June 21, 1954, on the Motion of Dudley, Hoffman & McGowan, substituted attorneys for plaintiff, requesting confirmation of Findings of Fact and Conclusions of Law heretofore filed herein by George A. Mena, District Court Commissioner, the 20th day of March, 1953, recommending the granting of a decree of divorce to plaintiff from defendant, on the ground of Incompatibility of Temperament.

Plaintiff appeared by her attorneys, Dudley, Hoffman & McGowan (Louis Hoffman, Esq., of counsel).

Defendant appeared by his attorney, Warren H. Young, Esq.

After hearing the argument of counsel on the Motion, the Court being satisfied in the premises, and on the basis of opinion heretofore rendered June 13, 1953 in the matter of *Alton* v. *Alton*, Civil No. 145-1953, it is hereby

ORDERED, that said Motion be and the same is hereby denied, and the Complaint herein dismissed for lack of jurisdiction over the plaintiff herein.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Court to be affixed this 21st day of June, 1954.

(s) Herman E. Moore
HERMAN E. MOORE
*Judge*

Attest:

(s) GEORGE A. MENA
*Clerk*

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FILED
DEC 15 1954
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR THE PETITIONER

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December 15, 1954

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The District Court rendered no opinion. Its order appears at R. 13-14. The *per curiam* opinion of the Court of Appeals (R. 15) is reported at 214 F. 2d 820. Both the District Court and the Court of Appeals decided this case in accordance with opinions rendered by them in *Alton* v. *Alton*. The District Court's opinion in *Alton* appears at 121 F. Supp. 878. The opinion of the Court of Appeals in that case is reported at 207 F. 2d 667.

The *Alton* case was briefed, argued and submitted to this Court at its last term, but was thereafter dismissed as moot. 347 U. S 610. This brief is a revision of the "Brief for the Petitioner" in *Alton*. The principal changes are a new section on the construction of the statutory provisions (p. 11); an additional suggestion as to the inapplicability of due process clause in this case (p. 28); and a substantially revised analysis of full faith and credit (p. 42). The Revised Organic Act of the Virgin Islands, which became law after *Alton*, is cited, and a few additional authorities are included.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1954 (R. 16). The petition for a writ of certiorari was filed in this Court on August 5, 1954, and was granted on October 14, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

1. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from making plaintiff's residence within its borders for six weeks prima facie evidence of domicile in a proceeding for divorce?

2. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from providing that upon proof of six weeks residence of a complaining party in a divorce action where the defendant has been personally served within the district or enters a general appearance, the court shall have jurisdiction of the action without further reference to domicile?

## STATUTE INVOLVED

Sections 8, 9 and 9(a) of the Divorce Law of the Virgin Islands[1] read as follows (Section 9(a) is in issue here):

> "Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is an inhabitant of the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has been an inhabitant thereof for six weeks prior to the commencement of the action.
>
> "Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plain-

[1] Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, as amended by Act, approved May 29, 1953 (Bill No. 55, 17th Legis. Ass. of the V. I.).

tiff therein must be an inhabitant of the district at the commencement of the action and for six weeks prior thereto, which residence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose.

"(a) Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

Section 17 thereof reads as follows:

"Should any section of this law or part thereof be declared invalid by a Court of competent jurisdiction, said declaration shall not invalidate the remainder of this law."

## STATEMENT

### A. Proceedings in Courts Below

Petitioner brought suit for divorce in the District Court of the Virgin Islands at Charlotte Amalie, St. Thomas on March 16, 1953 (R. 1).[2] Petitioner's verified complaint alleged (i) that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks prior to the commencement of the action; (ii) that Respondent was not a resident of the Virgin Islands and that his last known address was Scarsdale, New York; and (iii) that the parties were married in New York City, New

[2] Jurisdiction over divorce actions was vested in the District Court by 48 U.S.C. § 1406(4), superseded on July 22, 1954 by The Revised Organic Act of the Virgin Islands, 68 Stat. c. 588, §§ 21-23, 48 U.S.C. § 1541 note, § 1611-1613. The jurisdiction of the district court over divorce cases was not affected by adoption of the Revised Organic Act.

York, on September 28, 1929, and there are no children of the marriage under twenty-one years of age (R. 1). These allegations were followed by a detailed statement of facts on the basis of which a "state of irreconcilable incompatibility"[3] was alleged to exist between the parties (R. 1-3). The complaint prayed for a decree of absolute divorce. No relief relating to alimony or property was asked (R. 9).

Respondent entered an appearance, acknowledged receipt of the complaint, and waived service of summons (R. 6). He filed a verified answer in which he alleged lack of sufficient knowledge and information upon which to form a belief as to petitioner's allegation that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks (*Ibid*). He admitted the allegations in the complaint concerning his last known address, the date and place of the marriage, and the absence of children under twenty-one (*Ibid*). He denied all of the other allegations. Respondent simultaneously filed a "Waiver and Consent" in which he "agree[d] to the hearing of this cause as if by default", and he "consent[ed] to the making and entry of such findings of fact and conclusions of law and decree as to the Court may seem just and reasonable" (R. 6).

Testimony was thereafter taken before a Commissioner (R. 8). Petitioner testified that she became a resident of the Virgin Islands on February 1, 1953 (R. 8). Testimony was also taken in support of other allegations in the complaint (R. 8-9). Each party was represented by counsel (R. 9). No testimony was offered in behalf of Respondent.

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[3] "Incompatibility of temperament" constitutes one of eight grounds for divorce in the Virgin Islands. Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944 § 7(8). It has been construed to mean "disharmony * * * so deep and intense as to be irremediable", not merely "those petty quarrels and minor bickerings which are but the evidence of that frailty which all humanity is heir to". *Burch* v. *Burch*, 195 F. 2d 799, 807 (C.A. 3, 1952). This basis for divorce was in substance carried over from the Danish law in force in the Islands prior to 1920. See *Burch* v. *Burch*, Id. at 805.

On March 20, 1953, the Commissioner filed findings of fact which included, among others, a finding that Petitioner had been a resident in the Virgin Islands for more than six weeks prior to commencement of the action (R. 10). He concluded as a matter of law that a "state of incompatibility of temperament exists between the parties, which entitles the plaintiff to a decree of divorce absolute" (*Ibid*).

The proceedings were thereafter held in abeyance pending disposition of the appeal in *Alton* v. *Alton*. The *Alton* case was dismissed as moot by this Court on June 1, 1954, 347 U. S. 610. On June 21, 1954, petitioner's attorneys moved the District Court to confirm the Commissioner's report (R. 11). At a hearing on the motion, the Court inquired of counsel for Petitioner "whether you have any more evidence to offer on the question of domicile" (R. 12). Petitioner's counsel said he had none, and directed the attention of the Court to Section 9(a) of the Virgin Islands divorce law, p. 3, *supra* (*Ibid*). The Court ruled that Section 9(a) was not "sufficient to confer jurisdiction on this Court to grant this divorce" (R. 12). On June 21, 1954, the Court entered an order, dismissing the complaint on the sole ground that the Court lacked jurisdiction over the Plaintiff (R. 13). The Court relied in its order on the opinion it had rendered in *Alton* v. *Alton*, 121 F. Supp. 878 (D. Vir. Is. 1953).

On appeal, the Court of Appeals for the Third Circuit considered the matter *en banc* (R. 15). It affirmed the judgment of the District Court *per curiam* on the basis of its opinion in *Alton* v. *Alton*, 207 F. 2d 667 (C.A. 3, 1953). In that case the Court of Appeals held by a vote of four to three that the due process clause of the Fifth Amendment rendered invalid Section 9(a) of the Divorce Law of the Virgin Islands.[4]

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[4] Majority opinion by Goodrich, J., Maris, McLaughlin and Staley, J.J., concurring; dissenting opinion by Hastie, J., with whom Biggs, C.J., and Kalodner, J., concurred. The Court noted in its opinion in this case that "individual members of the Court have not modified their views as set out" in *Alton* v. *Alton* (R. 15).

### B. The Legislation and Its History

The Virgin Islands were acquired by the United States in 1917 by purchase from Denmark. They consist of two "districts", the Municipality of St. Thomas and St. John (comprising principally the two Islands of those names) and the Municipality of St. Croix. Their total population is approximately 26,665 (1950 census).

The Legislative Assembly of the Virgin Islands has full authority to enact laws with respect to the subject of divorce.[5] It also has authority to regulate the jurisdiction and procedure of the District Court of the Virgin Islands on that subject. The laws of the Virgin Islands are, of course, subject to due process limitations. Congress provided in the Organic Act that "no law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law" (48 U.S.C. 1406g; Revised Organic Act, 48 U.S.C. § 1561), and the due process clause of the Fifth Amendment has been held applicable to the Virgin Islands. *Soto* v. *United States*, 273 Fed. 628 (C.A. 3, 1921); *Thornberg* v. *Jorgensen*, 60 F. 2d 471 (C.A. 3, 1932); cf. *Balzac* v. *People of Puerto Rico*, 258 U.S. 298, 312-313.

On March 3, 1917, the Congress provided that local laws in force on the date of acquisition should continue in effect so far as consistent with changed sovereignty. 48 U.S.C. § 1392. Pursuant to this provision, the Danish

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[5] The Revised Organic Act of the Virgin Islands provides (Section 5, 48 USC § 1571) that the "legislative power * * * shall be vested in a legislature" and that the legislature "shall have and exercise all of the authority and attributes, inherent in legislative assemblies." Under Section 8, 48 USC § 1574, "The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands * * *." The Organic Act contained an identical provision, 48 USC § 1405r. The Court of Appeals has characterized the Legislature's power with respect to divorce as "on a par with the States" (207 F. 2d at 669).

law relating to divorce was in force until the Colonial Councils in 1920 and 1921 adopted Codes of Law for St. Croix and St. Thomas-St. John, respectively. (See *Burch* v. *Burch*, 195 F. 2d 799, 805 (C.A. 3, 1952)).

Since the adoption of those Codes, the islands have provided for divorce jurisdiction as to "inhabitants" who had a "residence" of specified duration.[6] In St. Thomas-St. John, between 1920-1921 and 1939 the "residence" period was six months. On October 2, 1939, it was reduced to six weeks.

In 1944 the Legislative Assembly adopted a divorce law applicable to the entire Virgin Islands.[7] This law included the six weeks "residence" requirement.[8]

Until after the decision of the Third Circuit in *Burch* v. *Burch*, 195 F. 2d 799 (April 16, 1952), it was *not* the practice in the Virgin Islands to offer any proof whatever in divorce actions with respect to domiciliary intent. Jurisdictional requirements were satisfied, according to accepted practice, by proof that the plaintiff lived in the district at the commencement of the action and had lived there continuously for the prescribed period. The legal profession of the Virgin Islands, prior to March, 1953, did not ask complainants in divorce actions, the "Nevada" question as to their intent "permanently or indefinitely" to remain in the jurisdiction.[9] The decrees of the court in divorce actions also made no reference to "domicile" or domiciliary intent. So far as can be ascertained, this continued the practice in the islands under Danish law.

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[6] Title III, c. 44, Code of the Municipality of St. Thomas and St. John, approved March 17, 1921.

[7] Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944.

[8] We attach as Appendix "A" a tabulation of the number of divorces granted in the Virgin Islands from 1940 through 1953.

[9] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 945, n. 36 (1945) quoted note 30 *infra*.

It is also reasonable to believe that the legislative authorities of the Virgin Islands did not in fact intend that the jurisdictional provisions of the divorce laws enacted and modified from time to time should be construed to require proof of domiciliary intent. The legislators were undoubtedly aware of the accepted local construction of the provisions, and they did not change them until after *Burch* v. *Burch, supra.*

In April, 1952, however, the Court of Appeals for the Third Circuit decided *Burch* v. *Burch, supra.* In that case, the Court of Appeals took the occasion to state that the words "inhabitancy" and "residence" in Sections 8 and 9 of the Divorce Laws of the Virgin Islands "must be taken to mean 'domiciliary' and 'domicile' ". See *Williams* v. *North Carolina* (I), 317 U.S. 287, 298; *Williams* v. *North Carolina* (II), 325 U.S. 226, 229.

On March 20, 1953, the Judge of the District Court of the Virgin Islands stated that *Burch* v. *Burch* prohibited him from signing decrees based on residence for six weeks, as had been the custom previously, without proof of domiciliary intent. Immediately the legislature proceeded to make its meaning clear and its intent unmistakable. On March 27, 1953, it enacted a bill eliminating references to "inhabitant" and "residence", and providing for jurisdiction in divorce actions when the plaintiff is "physically present" in the district at the time of the commencement of the action and has been "physically present" for six weeks prior thereto. (Bill No. 54, 17th Legislative Assembly, 2d Sess., March 27, 1953. The text of this bill is set forth as Appendix "B").

This bill was vetoed by the Governor on April 22, 1953, on the ground that divorce jurisdiction should not be exercised merely on the basis of six weeks physical presence "without the appearance of the defendant in the action or without a personal service of the complaint upon the defendant." The Governor stated that if this deficiency

were supplied, "the moral objection shall have disappeared." (The veto message is appended hereto as Appendix "C").

The legislature thereafter, on May 19, 1953, enacted the bill quoted above as Section 9(a), and also added the separability provision of Section 17 also quoted, p. 3, *supra*. The Governor signed the new bill on May 29, 1953. Bill No. 55, 17th Leg. Assembly, 3d Sess. 1953.

### C. The Opinions in *Alton* v. *Alton*

(1) As evidenced by their opinions in *Alton* v. *Alton*, all seven members of the Court of Appeals concurred in the construction of the statute here in issue. They agreed that Section 9(a) consists of two separable provisions (207 F. 2d at 670, 678). The first provision is a procedural rule that proof of six weeks continuous presence within the district by the plaintiff "shall be *prima facie* evidence of domicile." It merely casts upon the defendant the duty of producing some evidence contesting domicile, p. 17, *infra*. Thereupon, the effect of the presumption is dissipated. Domicile is still the basis of divorce jurisdiction under this section.

The second provision states that (i) where the plaintiff has been continuously present within the Virgin Islands for six weeks immediately prior to filing the complaint and (ii) where the defendant has been personally served within the jurisdiction or enters a general appearance, the Court shall have jurisdiction "without further reference to domicile." Both majority and the minority were in accord in *Alton* that by this provision the "Legislative Assembly intended to confer jurisdiction to divorce regardless of domicile" (207 F. 2d at 673, fn. 17; 678).[10]

[10] The District Court likewise construed the first provision of Section 9(a) as a "procedural statute setting forth the procedure for the Court in finding *prima facie* evidence of domicile", and it approached the second provision on the assumption that the legislature had made domicile "unnecessary" (121 F. Supp. at 882).

(2) The majority of the Court of Appeals (Opinion per Goodrich, J.), decided in *Alton* v. *Alton* that each of these provisions was unconstitutional. It held that the first provision, creating a rebuttable presumption of domicile from six weeks' continuous presence in the district, is unconstitutional under the due process clause because the fact of physical presence for the period has no "rational connection" with domicile. *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35. The Court suggested that the "reasonableness" of a legislative presumption must be more clearly established where the issue is "jurisdictional" than where it pertains to the merits (207 F. 2d at 671-672). In considering the reasonableness of the provision, the Court felt that the *prima facie* character of the presumption should be discounted because many divorce actions are uncontested (207 F. 2d at 672).

As to the second provision of Section 9(a), the Court held that the due process clause of the Federal Constitution requires a territory or a state to base divorce jurisdiction on the domicile of at least one party (207 F. 2d at 677). It was of the view, in other words, that a state or territory lacks power to provide for the exercise of divorce jurisdiction on the basis of residence and personal jurisdiction of the parties without reference to domiciliary intent. It was of the opinion that a divorce granted on this basis would not be entitled to full faith and credit, and it held that a legislature was without power to authorize a divorce which would not be protected by the full faith and credit clause.

(3) Biggs, C. J., and Hastie and Kalodner, J. J., dissenting, (per Hastie, J.), held that the legislature had power to make continuous presence for six weeks *prima facie* proof of domicile. They stated that such presence was reasonably related to and rationally connected with domicile (207 F. 2d at 679). They were of the opinion that the "jurisdictional" character of the issue did not

adversely affect the validity of the presumption; and that the expected frequency with which the *prima facie* presumption would or would not be challenged did not affect the fairness of the presumption and, therefore, did not modify the power of the legislature to prescribe it (207 F. 2d at 680). Finally, they challenged the application of the due process clause because the presumption does not deprive any person of a full opportunity to challenge the domiciliary claim.

As to the second clause of the statute, the dissenters stated that "domicile" was a judicial rule subject to legislative change, and not a constitutional principle (207 F. 2d at 681). They discussed the history of the domicile rule in the courts and pointed to the experience of other English speaking countries which have by legislation departed in various circumstances from a domiciliary rule for divorce jurisdiction (207 F. 2d at 682). They concluded that there "is room for difference of judgment" as to the merits of the domicile rule and that the legislature here has avoided the disregard of "interests on defendant's side which is the greatest weakness of the domiciliary rule" (207 F. 2d at 683). Accordingly, they were of the view that the due process clause did not prevent the legislature from authorizing divorce jurisdiction without reference to domicile.

### D. The Construction of the Statutory Provisions

Since the respondent appeared generally in this action, either provision of the amendment would serve to provide a jurisdictional basis for this suit.[11] Accordingly, if either is constitutional the judgment below must be reversed.

In construing the second provision of the amendment it is important to note that the legislature's first attempt to

[11] Section 17 of the Divorce Act, p. 3, *supra*, provides that a decision invalidating one section of the Act shall not void the remainder of the statute.

change the Virgin Islands law, after the decision in *Burch* v. *Burch*, *supra*, took the form of a simple bill basing jurisdiction solely upon the "physical presence" of the plaintiff for six weeks prior to the commencement of the action (see Appendix B hereto).[12] There can be no doubt that the legislature intended by this bill to eliminate the requirement for proof of domiciliary intent that the Court of Appeals held necessary under the prior law.

In his message vetoing this bill, the Governor stated that "it has been suggested" that six weeks' presence should be sufficient "to give the District Court jurisdiction in those cases only where the defendant is personally served within the district or enters a general appearance in the action" (see Appendix C hereto).

It seems clear that the legislature intended to incorporate this suggestion in the second provision of the amendment here in issue.[13] They intended, in other words, to make *Burch* v. *Burch* inapplicable where the defined circumstances existed. They retained the requirement of six weeks' presence which appeared in the earlier bill, and by restricting the applicability of the provision to cases where the defendant was generally subject to the jurisdiction of the court they satisfied the Governor's objections. As he said, this being done "the moral objection [presumably to the *ex parte* feature of the earlier bill] shall have disappeared."

The Court of Appeals was of the opinion that by this provision the legislature "without a doubt . . . intended to confer jurisdiction to divorce regardless of domicile" (207 F. 2d at 673, fn. 17). As noted above, all of the seven judges were of the same opinion, as was the District Judge.

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[12] Since *Burch* v. *Burch*, 195 F. 2d 799 (C.A. 3, 1952), the District Court has frequently conducted *sua sponte* a searching inquiry into "domicile" and "domiciliary intent". See *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), p. 24, *infra*.

[13] Counsel have examined the typewritten "Proceedings and Debates"; Second Session and Third Session, Legislative Assembly of the Virgin Islands, on March 27, 1953, and May 11-May 20, 1953, respectively, at which the amendments were discussed, but they are uninformative.

The construction of this provision by the lower courts is entitled to the greatest weight under the decisions of this court. The District Court, which possesses both local and federal jurisdiction, acted in this case as a local court construing an act of the local legislature.[14] The Court of Appeals reviewed the case as if it were the Supreme Court of a state. In reviewing judgments of the Virgin Islands District Court, it examines the record *de novo.* See *People of Virgin Islands* v. *Price,* 181 F. 2d 394, 398-399 (C.A. 3, 1950); *Callwood* v. *Kean,* 189 F. 2d 565, 581 (C.A. 3, 1951); *Berger* v. *Berger,* 210 F. 2d 403, 404 (C.A. 3, 1954). Both courts are familiar with the local history and institutions of the Virgin Islands.[15]

This Court has repeatedly held that to reverse the judgment of a territorial tribunal "on such a local matter as the interpretation of an act of the local legislature * * * the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous." *Sancho* v. *Texas Co.,* 308 U. S. 463, 471; *Waialua Agricultural Co.* v. *Christian,* 305 U. S. 91; *De Castro* v. *Board of Commissioners of San Juan,* 322 U. S. 451.[16]

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[14] At the time suit was commenced, the Organic Act expressly vested the District Court with jurisdiction over "all cases of divorce and annulment of marriage" (48 U.S.C. § 1406). The Revised Organic Act provides (48 U.S.C. § 1612) that the District Court "shall have the jurisdiction of a district court of the United States in all causes arising under the constitution, treaties, and laws of the United States * * *" and "it shall have general original jurisdiction in all other causes in the Virgin Islands, exclusive jurisdiction over which is not conferred by this Act upon the inferior courts of the Virgin Islands." The inferior courts are not given jurisdiction over divorce cases (48 U.S.C. § 1613).

[15] See for example, the exhaustive review of the history of divorce legislation in *Burch* v. *Burch,* 195 F. 2d 799 (C.A. 3, 1952) (Opinion per Maris, J.). The Court of Appeals holds an annual session in the Virgin Islands.

[16] Decisions by the District of Columbia courts on points of local law are not disturbed by this Court unless "egregious error has been committed." *Fisher* v. *United States,* 328 U.S. 463, 476; *Griffin* v. *United States,* 336 U.S. 704, 717-719.

## SUMMARY OF ARGUMENT

The first provision of the statute is valid. It creates a *prima facie* procedural presumption of domicile which vanishes upon the introduction of contrary evidence. Domicile is retained as a basis of jurisdiction. The facts to be proved—six weeks' continuous residence—have a rational connection with domicile. These facts prove one of the elements of domicile and are evidence as to domiciliary intent. It is clearly within the legislative power to prescribe this rule of procedure and it does not violate the due process clause. The fact that the presumption relates to a "jurisdictional fact" does not alter the result. It is also of no consequence that divorce cases are infrequently contested. The prima facie presumption does not obstruct the opportunity to contest. In fact, the Virgin Islands law and procedure are unusually solicitous about affording an opportunity to contest and contests occur.

The second provision of the statute is valid. The legislature has power to provide that the court shall have jurisdiction in divorce actions upon proof of six weeks' continuous presence and personal jurisdiction over the defendant "without further reference to domicile." There is doubt that due process considerations are appropriate in this case since there is no contention of injury by any person. Fundamentally, however, domicile is not a constitutional requirement of divorce jurisdiction, beyond the power of a legislature to modify or abolish. A state or territory has full power to grant divorces on whatever basis it sees fit, consistent with procedural due process, and such divorces are valid within its own borders. That is the only issue here. The applicability or non-applicability of the full faith and credit clause does not determine the constitutional validity of the statute. In any event, a decree under the statutory provision under consideration would be entitled to full faith and credit.

## ARGUMENT

### I. THE ISSUE

In the present case, the court has personal jurisdiction of both parties. This case, therefore, does not involve the issue of power to grant divorces where the defendant is not personally subject to the jurisdiction of the court, although the first provision of the law, creating a rebuttable presumption, is by its own terms available in those circumstances. Further, the case is here as a result of appeal from the court in which jurisdiction to grant the divorce is claimed to exist. It does not present the question of the extra-territorial effect, if any, to be given to a decree obtained under and by reason of the statutory provisions in issue.[17]

The question involved, therefore, is whether, in a case where the defendant appears generally, the Constitution of the United States deprives a legislature of power to provide for jurisdiction in divorce cases unless it requires affirmative evidentiary proof of domiciliary intent. The Court of Appeals stated that such testimony as to domiciliary intent is frequently "evasive or even perjured" (207 F. 2d at 673). We believe that it was error to hold that the requirement of such testimony is a constitutional imperative forever beyond the power of the states or territories to affect or abolish.

At the outset it is necessary to note that there is doubt that the due process clause is applicable in the circumstances of this case. No "person" is here complaining or is being deprived of any rights or privileges, procedural or substantive.[18]

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[17] Congress has provided that the official acts, records and judicial proceedings of a territory shall be entitled to full faith and credit (28 U.S.C. §1738). We believe divorces granted pursuant to this statute would be entitled to full faith and credit, p. 45, *infra*.

[18] See discussion, pp. 28-29, *infra*.

## II. THE PRESUMPTION IS VALID

The majority of the Court of Appeals held that the due process clause forbids a legislature from providing that "if the plaintiff is within the district at the time of filing of the complaint and has been continuously for six weeks prior thereto, this shall be *prima facie* evidence of domicile." Its view was that six weeks' presence does not create a "rational foundation on which to base a finding of domicile" (207 F. 2d at 671). Absent proof of intent, six weeks' residence, said the court, "tends to establish nothing but the fact of six weeks' physical presence" (*Ibid*). On the other hand, the dissent considered the presumption entirely proper, pointing out that the period of presence within the jurisdiction establishes one of the elements of domicile and is evidence as to domiciliary intent (207 F. 2d at 679).

The majority sought to buttress its conclusion by two arguments: (1) that there should be more difficulty in supporting a jurisdictional presumption than in sustaining other kinds of presumptions, *e.g.*, a presumption permitting an inference of negligence to be drawn from named operative facts (207 F. 2d at 671); and (2) because most divorce actions are uncontested, the procedural or *prima facie* character of the presumption should be substantially disregarded (*Id.* at 672).

The court recognized that in many cases the presumption "will doubtless eliminate" "evasive or even perjured testimony", but it said that a finding of domicile would be "contrary to the true fact in the great majority of cases" (*Id.* at 673). The court accordingly held the presumption invalid.

### 1. The Presumption Is Reasonable

There can be no doubt of the power of the legislature to create evidentiary presumptions. This Court has held that:

> "Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another fact." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81.

The rule governing the application of legislative presumptions was stated in *Mobile, J. & K.C.C.R. Co.* v. *Turnipseed*, 219 U.S. 35, as follows:

> ". . . it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. 'If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'" 219 U. S. at 43.

In this case, as in *Turnipseed, supra*, the effect of the presumption is solely "to cast upon [the defendant] the duty of producing evidence to the contrary. When that is done the inference is at an end" and the question is to be decided upon all of the evidence.[19] As the District Court stated, "this is a procedural statute" (121 F. Supp. at 882). The presumption in this case does not

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[19] "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof, there is nothing to justify a finding based solely upon it." *Potts* v. *Pardee*, 220 N.Y. 431, 433, 116 N.E. 78, 79 (1917).

create an inference which is given the effect of evidence to be weighed against opposing testimony, and which prevails unless such testimony is preponderant. Cf. *Western & A. R. R.* v. *Henderson*, 279 U. S. 639. It "does not operate to preclude any defense." *Cockrill* v. *People of California*, 268 U. S. 258, 261; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380. The presumption simply makes it unnecessary for the plaintiff to introduce evidence of domiciliary intent unless the defendant or the trial court itself[20] adduces conflicting evidence on that issue.

There can be no doubt that there is "some rational connection" between continuous presence for a period of time and domicile. It is, of course, true that evidence as to continuous presence would not logically be conclusive of an intention to remain indefinitely.[21] But the function of a presumption is always to bridge a gap between the facts shown and the conclusion to be established. *Cf.* Morgan and Maguire, *Cases on Evidence*, p. 84-85 (1942 ed.). A classic illustration is the presumption that where freight is delivered in good order to an initial carrier and in bad order to a consignee by a terminal carrier, it is presumed that the damage was caused by the terminal carrier, although the property may have been transported over the lines of several connecting carriers, any one of which may have been at fault. *Id.* at p. 89. In various jurisdictions the gap between six weeks' presence and domicile is customarily bridged by formal evidence of a dubious character (see p. 20, *infra*). Certainly the legislature does not violate the Bill of Rights

[20] See *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), p. 24, *infra*.

[21] Domicile has been more accurately defined in these terms: "[The] essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere." Story, *Conflict of Laws* § 43 (1834). The intention to stay for a time to which a person "did not then contemplate an end" was held sufficient in *Williamson* v. *Osenton*, 232 U.S. 619, 625. See also *Bergner and Engel Brewing Co.* v. *Dreyfus*, 172 Mass. 154, 51 N.E. 531 (1898) (per Holmes, J.)

when it undertakes to bridge the gap by a procedural presumption.

Indeed, the connection between the fact to be proved and the inference to be drawn is more logical in the present case than in many cases where presumptions have been sustained. In *Turnipseed*, absent the presumption, proof that the injury was inflicted by a railroad car, without more, would not indicate negligence on the part of the railroad. It would be a neutral fact with respect to the issue of responsibility. In *Yee Hem* v. *United States*, 268 U. S. 178, the presence of opium within the United States would not normally lead to an inference as to when it had been imported. Nevertheless, this Court sustained a statute providing that in such instance the opium "shall be presumed to have been imported after" a certain date. "If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute." *Yee Hem* v. *United States*, *supra*, at 185. This Court has never declared unconstitutional on grounds of due process a state statute applicable to civil proceedings which created merely a temporary inference of fact that vanished upon the introduction of opposing evidence.[22]

[22] State statutes creating presumptions have been frequently upheld by this Court against contentions that due process was being violated. *Adler* v. *Board of Education*, 342 U.S. 485; *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233; *Hawkins* v. *Bleakly*, 243 U.S. 210; *Easterling Lumber Co.* v. *Pierce*, 235 U.S. 380; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. The statute creating an inference of negligence in accidents involving a railroad was struck down in *Western & A. R. R.* v. *Henderson*, 279 U.S. 639, because the trial "court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." 279 U.S. at 642. The offense against due process thus consisted in the use of a presumption as evidence. See *Atlantic Coast Line R. Co.* v. *Ford*, 287 U.S. 502, 507-508.

The civil presumption in *Ogama* v. *State of California*, 332 U.S. 633, was held repugnant to the equal protection clause.

The Court of Appeals was of the opinion that a presumption as to domicile based on a period of residence, however long, would present difficulties because it "jumps the difficult phase in the proof of domicile, namely, the intent to make a home in the place where domicile is claimed" (207 F. 2d at 671). In practice, however, especially in jurisdictions with a large volume of divorce litigation, proof of continuous presence in a jurisdiction for a period of time is usually the only substantial fact from which domiciliary intent may be inferred. Testimony as to intent, and evidence, where it is elicited, as to such matters as obtaining a driver's license, a library card, or even employment, is apt to be of debatable reliability in the search for "domicile". Indeed, such testimony is apt to be no more than elaborate embellishments of a basically "evasive or perjurious ritual." It is certainly not unreasonable for a legislature to enact a *prima facie* rule dispensing with evidence on these points in the absence of contest, and providing a procedural presumption from the basic and objective facts of evidence.

A presumption of domicile in divorce cases based upon residence was recently upheld by the New Mexico Supreme Court after an elaborate analysis of the problem. *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954). A New Mexico statute provides that military personnel continuously stationed in any military base in New Mexico for a period of one year shall be "deemed residents in good faith" for purposes of divorce jurisdiction. The Court concluded that this "statutory presumption is not unconstitutional" because "there is a rational connection between the fact proved (one year continuously stationed in New Mexico) and the fact presumed (domiciliary intent)" (274 P. 2d at 133). The Court recognized that it was extending "the idea of domicile beyond the area of the integrity of individual intent to an area which might be called 'military domicile' in which individual intent has no place." (*Ibid*). The court ruled that given proof

that the plaintiff was continuously stationed in the state for one year, the "presumption of domicile is conclusive" (*Ibid*). Cf. *Mills* v. *Mills*, 153 Fla. 746, 15 So. 2d 763 (1943); *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936), p. 38, *infra*.

The length of residence required as a basis for the presumption is peculiarly a legislative and not a judicial function. "Long residence does not constitute nor does brief residence negative domicile." Cheshire, *Private International Law* 160 (4th Ed. 1952). The period specified here as a basis for the presumption continues the pre-existing standard of the Virgin Islands. It also reflects the practice in a number of states and is not greatly different from the period prescribed by others.[23]

### 2. It Is Immaterial That the Presumption Relates to a Jurisdictional Fact

The Court of Appeals in *Alton* cited no precedent for its novel suggestion that a heavier burden exists where the fact presumed is jurisdictional than where it is one of the ultimate facts relating to the merits. In *Yee Hem* v. *United States*, 268 U.S. 178, this Court upheld a federal statute creating a presumption as to a jurisdictional fact, namely the importation of opium after a specified date. No reference was made to the jurisdictional character of the fact presumed. See also *Tot* v. *United States*, 319 U. S. 463.

Indeed, it is arguable that if a distinction is to be made between presumptions of jurisdictional fact and those relating to the merits, the balance should be exactly the opposite of that suggested by the Court of Appeals. A jurisdictional presumption serves merely to obtain a hearing on the merits. Other presumptions make inroads on the presumption of innocence, *Yee Hem* v. *United States*, 268

[23] In Idaho, Nevada, and Arkansas, jurisdiction is based upon six weeks' residence. Ida. Code (1947) § 32-701; Nev. Comp. Laws (1929) § 9460; Ark. Stat. (1947) § 34-1208. Sixty days are required in Wyoming, Wyo. Comp. Stat. (1945) § 3-5407, and 90 days in Florida, Fla. Stat. Anno. (1943) § 65.02.

U. S. 178; *Hawes* v. *Georgia*, 258 U. S. 1, or may result in the loss of citizenship, property, or employment unless successfully contested. *Luria* v. *United States*, 231 U. S. 9; *Cockrill et al.* v. *People of State of California*, 268 U. S. 258; *Adler* v. *Board of Education*, 342 U. S. 485.

### 3. The Likelihood of Contest Is Immaterial

The Court of Appeals felt that the fact that most divorce actions are not actually contested has a bearing upon the reasonable character of the presumption (207 F. 2d at 672). It is probably true in our society that only a small percentage of divorce cases is contested. But this has nothing to do with the reasonableness of the presumption. It is true regardless of where the divorce actions are brought, and even if they are filed in the matrimonial domicile. For example, the Court of Appeals itself points to the infrequency of contest in Maryland which it says has "almost no migratory divorce problem" (*Ibid*). The infrequency of contest indicates nothing except that both spouses usually join or acquiesce in the conclusion that their differences are irreconcilable and that the marriage should be dissolved. The *prima facie* presumption will not increase or decrease the frequency of contests. A defendant who would not contest jurisdiction under this statute would not contest the plaintiff's evidence as to domicile. The relevant fact is that the presumption leaves the opportunity to contest completely unimpaired.

The Virgin Islands procedure includes all of the conventional and some unusual provisions to assure notice and opportunity for contest, and since *Burch* v. *Burch*, the court itself has conducted searching inquiries into domicile.

If the defendant is within the jurisdiction, personal service is, of course, required. If the defendant is not within the jurisdiction, the plaintiff must make affidavit to that effect (See R. 3-4). Thereupon, the court orders either that a copy of the summons and complaint be sent by registered mail to the defendant's last known address and notice be given by publication in a Virgin Islands

newspaper (R. 4-5), or that personal service of the summons and complaint be made upon the defendant outside of the jurisdiction.[24]

A special appearance may be filed to contest jurisdiction. Objections raised informally by letter as well as by formal pleadings are entertained. Even telephone calls are meticulously noticed where opposition is indicated. The practice is to notify counsel for the plaintiff that opposition has been indicated, and this frequently results in withdrawal of the complaint, as we discuss below. The court will hold hearings on jurisdiction, and if the court believes that it does not have jurisdiction and the complaint is not withdrawn, the complaint will be dismissed. See *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), p. 24, *infra*. If the court determines that it has jurisdiction, the defendant may proceed on the merits or may appeal on the basis of his special appearance. Appeals may be taken to the Court of Appeals for the Third Circuit which reviews the record *de novo*. *Clen* v. *Jorgensen*, 265 Fed. 120, 124 (C. A. 3, 1920); *People of Virgin Islands* v. *Price*, 181 F. 2d 394, 398 (C. A. 3, 1950); *Burch* v. *Burch*, 195 F. 2d 799, 804 (C. A. 3, 1952).

We have appended hereto as Appendix "D" to this brief and filed with the Clerk of this Court a certified copy of a certificate by the Clerk of the District Court of the Virgin Islands setting forth the results of a detailed study of the disposition of 310 of the 343 cases "concluded" in 1952. These are all of the cases in that category in the Municipality of St. Thomas and St. John, the balance being in St. Croix. This study shows that of the 310 cases, only 31 were disposed of *ex parte*, that is, without an answer being filed or appearance entered. In 257 cases, answers were filed and general appearance was entered although no conflicting evidence tendered by the parties. In four cases, the defendant appeared specially to contest jurisdiction. In thirteen, the complaint was withdrawn, either before or after answer or hearing. The Clerk's certificate notes that some

[24] Code of Municipality, St. Thomas-St. John, Tit. III, Ch. 4 § 7.

of these were discontinued after jurisdictional issues were raised by informal communication. In two cases, contest resulted in adversary trial of the issues as to jurisdiction and on the merits; and in two, cross bills were filed by the defendant. The Court of Appeals accordingly was mistaken in saying that 343 divorce cases were "concluded" in 1952, and only one was "contested" (207 F. 2d at 672).[25]

The foregoing figures not only evidence the fact that defendants have ample opportunity for contest under Virgin Islands procedure, but they also show that defendants usually participate in the proceedings, and occasionally actively dispute the plaintiff's allegations. The *prima facie* presumption will not impair the defendant's opportunity to appear specially and contest the plaintiff's allegations of domicile.

The majority of the Court of Appeals also ignores the fact that the District Court may, and occasionally does, *sua sponte*, inquire as to jurisdictional facts even in the absence of the defendant. This is demonstrated by *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), decided subsequent to *Alton*. In that case, the plaintiff, a professional singer, filed his petition for divorce about nine weeks after arrival from New York. On the next day he left the Virgin Islands to fulfill professional engagements in Puerto Rico, the United States, and Canada. He returned to the Virgin Islands about seven months later. The record shows that his wife had entered a general appearance but she did not actually contest jurisdiction. The Court of Appeals refers to the fact that the District Judge conducted "a rather searching questioning" of the plaintiff on the issue of domicile[26] and thereupon denied the divorce on the

[25] We are informed that the figures used in Judge Goodrich's opinion were the formal statistics supplied to him by the Clerk of the District Court. The results set forth in Appendix "D" are based upon a study that was made upon the detailed request of counsel. They would not be disclosed . . routine court statistics.

[26] Contrast the Nevada practice. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443, 462 (1953).

grounds that plaintiff had not proved that he was domiciled in the Islands. The Court of Appeals reversed, holding that domicile had been proved (Maris, Woodbury and Hastie, J. J.). A reading of this case is instructive as to the thin line that divides "domicile" and the lack thereof.

Beyond this, the Divorce Law of the Virgin Islands contains an extraordinary provision authorizing the District Court to require, as a condition of the maintenance of the action, that a plaintiff husband pay to the wife an amount of money necessary to enable her to defend the action.[27] In practice where this provision is invoked by a non-resident defendant, the court requires the husband to pay transportation and hotel expenses, and a preliminary counsel fee. This procedure is often used. A typical order is attached hereto as Appendix "E".

The Court of Appeals recognized that "The statutory presumption in the present case will doubtless eliminate the temptation to . . . perjury" (207 F. 2d at 673), which it said is frequently the basis of proof of domicile in divorce cases brought away from the matrimonial domicile. It nevertheless held that the presumption is forbidden by the due process clause. We do not believe that the Bill of Rights enacts a prohibition against legislative action designed, in the absence of challenge by the Court or a party, to make it unnecessary for lawyers to ask and witnesses to

[27] Section 11 of the divorce law provides: "After the commencement of an action, and before a judgment therein, the court or judge thereof may, in its discretion provide by order as follows: (1) That the husband pay, or secure to be paid, to the Clerk of the Court such an amount of money as may be necessary to enable the wife to prosecute or defend the action, as the case may be; (2) For the care, custody, and maintenance of the minor children of the marriage during the pendency of the action; (3) For the freedom of the wife from the control of the husband during the pendency of the action and the Court may restrain [sic] either or both parties from disposing of the property of either party pending the action." Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, as amended by Act, approved May 29, 1953.

answer as to their frequently dubious intent.[28] The presumption will neither increase nor decrease the number of divorces obtained by people who leave their previous homes for the purpose.

In any event, it is clear that the statutory provision in issue, the *prima facie* presumption, fully safeguards the right to contest allegations of domicile; that the presumption is procedural and its force disappears when countervailing evidence is introduced; and that there is full opportunity under Virgin Islands law and actual practice to contest jurisdiction. The presumption will not alter the frequency or infrequency of contest. It is sufficient that it leaves the right and opportunity unimpaired. The presumption accordingly does not violate the due process clause.

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[28] "The discrepancy between the law of the books and the law in action, which we find in so many states, has through its tolerance of promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and respect for law among the public." Rheinstein, *Trends of Marriage and Divorce Law of Western Countries*, 18 Law and Contemp. Prob. 3, 19 (Winter 1953). "It is not over-healthy to keep in operation any system built on a theory as to controversy, fault, and collusion which the bulk of otherwise decent people who have occasion to deal with it regard it as necessary to cheat. Neither made-to-order evidence nor perjury are useful social products * * *." Llewellyn, *Behind The Law of Divorce*, 33 Col. L. Rev. 249, 281, n. 77 (1933). *Cf.* the remarks of Mr. Justice Frankfurter concerning the M'Naghten rules before the Royal Commission on Capital Punishment, Cmd. 8932, p. 102 (1953): "If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us—they are honoured in the breach and not in the observance—then I think the law serves its best interests by trying to be more honest about it * * *. I am a great believer in being as candid as possible about my institutions."

As to the professional problems which the current state of the law creates for lawyers, see Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443 (1953).

## III. THE LEGISLATURE HAS POWER TO BASE DIVORCE JURISDICTION UPON SIX WEEKS' RESIDENCE AND PERSONAL JURSDICTION OF BOTH PARTIES

The second clause of the statute provides that where the plaintiff satisfies the residence requirement and the "defendant has been personally served within the jurisdiction or enters a general appearance in the action, then the Court shall have jurisdiction . . . without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose." This provision, as well as the *prima facie* presumption, is available in this case as a basis of jurisdiction since (1) the defendant entered a general appearance and was represented by counsel and (2) the plaintiff had satisfied the residence requirements of the statute, pp. 3-5, *supra*.

The majority of the Court of Appeals held that this provision of the statute conflicts with the due process clause of the Fifth Amendment and of the Organic Act. Its thesis was that domicile is fundamental to divorce jurisdiction and therefore a due process requirement. Primarily, the court reasoned that, although the issue here was restricted to the power of the divorce state, other jurisdictions would not be required under the full faith and credit clause to recognize a divorce decree granted in the absence of domicile, and that accordingly it would be a violation of due process for the non-domiciliary jurisdiction to enter the decree. In other words, the majority of the court held that in this type of case "due process at home and full faith and credit in another state are correlative." (207 F. 2d at 676).

We believe that the court's decision is incorrect. Preliminarily, we suggest that the due process clause may not be applicable to this case because no person is being deprived of any rights. But fundamentally, we submit that the due process clause does not prevent a legislature from prescribing standards for divorce jurisdiction which do not include proof of domiciliary intent. The traditional elements of domicile are neither a fundamental nor a con-

stitutional requirement for divorce jurisdiction beyond the reach of legislative authority. The due process clause does not require adherence to a formal and frequently perjurious ritual. The applicability of the full faith and credit clause does not determine the incidence of the due process clause; and, in any event, a divorce decree rendered in full compliance with the requirements of a state or territory, based upon the continuous presence of the plaintiff and personal jurisdiction of both parties, would be entitled to the benefits of recognition by other jurisdictions under the full faith and credit clause.

It is important again to emphasize that this case does not present any issue as to extra-territorial recognition. It is here as a result of the refusal of the District Court to exercise jurisdiction in the divorce action on the grounds of the unconstitutionality of the statutory provisions.

### A. DUE PROCESS

At the outset, it is necessary to inquire whether any issues under the due process clause are before the Court in this case. No person is being deprived of any rights, procedural or substantive. Plaintiff and defendant are the only "persons" concerned, and neither of them is injured or threatened with injury. The defendant has accepted the jurisdiction of the Virgin Islands court, and has consented to the entry of judgment (R. 6). Clearly, he is not being deprived of life, liberty or property within the meaning of the due process clause. In our opinion, there are no other rights, prerogatives, or values involved in this case which are appropriate for or which justify or demand the protection of the due process clause.

The Court of Appeals, however, considered that the due process clause could be invoked on behalf of the supposed interests of hypothetical and unidentified "domiciliary states", i.e., to prevent a legislature from taking "to itself the readjustment of domestic relations of those domiciled elsewhere" (207 F. 2d at 677). According to the majority this interest of the state in which persons "have their

homes" is "fundamental" and therefore protected by the due process clause—presumably even in a proceeding to which the state is not a party or a participant in any sense.[28a]

We hereinafter discuss the debatable merits of this assumed interest of the "domiciliary state". Our present point, however, is that this "interest" has no place in the present proceeding. If there is a fundamental interest of another jurisdiction which should be protected, this is not the proceeding in which that may be considered.

This is an action for divorce under the Virgin Islands law. It is not an action to assert rights or determine status under the law of any other jurisdiction. No other jurisdiction has intervened in these proceedings. We do not know whether any other jurisdiction objects. We do not know where the parties "make their home." We do not know whether they will remain in the Virgin Islands, as many persons do after divorce regardless of their original intention or lack thereof. We do not know whether, if they leave the Virgin Islands, they will return to their previous home or will move to another state. We do not know whether the jurisdictions in which they reside consider their policy offended by the Virgin Islands divorce, or whether they are entirely agreeable to such divorce.

Even if we assume then that another jurisdiction or other jurisdictions may have a "fundamental" interest in whether Mr. and Mrs. Granville-Smith are divorced, we respectfully suggest that the courts should not in this proceeding postulate such interest and proceed to vindicate it by application of the due process clause. This interest, if it exists, should be considered only in a proceeding in

[28a] The Court of Appeals compared the situation here to an attempt by a state "to confer jurisdiction in matters concerning collision at sea upon a state court, in the absence of dissent by either party" (207 F. 2d at 667). Such an attempt would clearly be beyond the power of the state because the subject matter is confined to the federal courts by Article III of the Federal Constitution. But the analogy is inapplicable here; divorce is clearly within the jurisdiction of the states.

which the putative "domiciliary state" participates. In the present action, only Mr. and Mrs. Granville-Smith are parties, and there is no claim that any rights of either of them are being invaded.

### 1. The Authority of a State or Territory

Fundamentally, however, it is our position that the second provision of the statute does not offend the due process clause. On numerous occasions, various justices of this Court have recognized the authority of a state, so far as validity within its own borders is concerned, to grant divorces on whatever basis it sees fit, consistent with procedural due process. In *Williams* v. *North Carolina* (I), 317 U. S. 287, at 299, the Court stated:

> "[I]f the Nevada decrees are taken at their full face value . . . they were wholly effective to change in that state the marital status of petitioners . . ."

Mr. Justice Frankfurter concurring in that case, stated:

> "It is indisputable that the Nevada decrees here, like the Connecticut decree in the Haddock case were valid and binding in the state where they were rendered."

Mr. Justice Murphy, concurring for himself, the Chief Justice and Mr. Justice Jackson, in the second *Williams* case, *Williams* v. *North Carolina*, 325 U. S. 226, 239, stated as follows:

> "The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders."

And Justices Black and Douglas, dissenting, in the second *Williams* case, stated specifically (325 U. S. at 274):

> "The jurisdiction of state courts over persons and things within their boundaries has been uniformly acknowledged through the years, without regard to the length of their sojourn or their intention to remain.

> And that jurisdiction has not been thought to be limited by the Federal Constitution."

See also Rutledge, J., dissenting, 325 U. S. at 246.[29]

The statutory provision here is an appropriate exercise of state or territorial power. In actuality, its effect is extremely limited. It is neither drastic nor revolutionary. It represents merely an effort to deal honestly with a problem which has resulted in a great deal of perjury and in debasement of the standards of justice. The provision does nothing more than to eliminate the necessity for "evidence" as to intent to remain in the jurisdiction. It makes it unnecessary for counsel to ask or witnesses to answer the "Nevada" question as to intention to establish "an indefinite permanent residence".[30] It eliminates the practice, in vogue in some jurisdictions, of requiring the plaintiff to buy a fishing license even if he does not wish to fish; a driver's license, even if he does not propose to drive; and a library card even if he proposes not to read.

It seems, however, to be the position of the court below that these petty deceits, or at least the affirmation by the plaintiff of intention to remain, are a constitutional requirement which makes the difference between validity of the resulting decree at home and recognition abroad on the one hand, and invalidity everywhere on the other.

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[29] "We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered * * *." *Sutton* v. *Leib*, 188 F. 2d 766, 768 (C.A. 7, 1951), reversed on other grounds, 342 U.S. 402.

[30] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 945, n. 36 (1945):

> "Q. What was your object and intention in coming here at that time?
>
> A. To establish a residence.
>
> Q. And did you establish a residence?
>
> A. Yes.
>
> Q. And that residence was an indefinite permanent residence?
>
> A. Yes."

The court below recognized that in certain states applying the domicile test "The court's finding of domicile usually is contrary to the fact and frequently is based upon evasive or even perjured testimony" (207 F. 2d at 673). In 1935 members of the Nevada Bar said that "Today divorce may be had in Nevada by mutual consent and with the absolute minimum of strain on anything but the conscience." Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law & Contemp. Prob. 302, 305 (1935). And this was all accomplished by a "convention in perjury". Id. at 306. The situation is unchanged. Yet the court below holds in effect that the Constitution requires such a convention in perjury and condemns an attempt by an insular legislature to eliminate the prevarication and evasion. Stripped to its essence, the question is whether legislatures have the power to act in the interests of the integrity of their legal processes and in the light of reality, or whether they are bound unalterably to require an incantation by the plaintiff, however empty, of the formula of domicile.

In the Virgin Islands there is no tradition of these deceits. After the decision in *Burch* v. *Burch*, *supra*, which construed the Virgin Islands law prior to the amendments in issue to require domicile as a basis of divorce jurisdiction, the Bar might have recommended and the legislature might have decided to respond by adopting the ritual generally used in Nevada, Arkansas, Idaho, Florida, and other states. They did not so decide. On the contrary, the legislature adopted the provisions at issue here to make this deceit unnecessary. We do not believe that its decision conflicts with the due process clause, with "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

### 2. The History of Domicile

The concept of domicile in connection with divorce is of relatively recent origin. There is general agreement that the doctrine was introduced by Story in 1834 in his *Commentaries on the Conflict of Laws*. Cook, *The Logical and Legal Basis of the Conflict of Laws*, c. XVIII (1942); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 229 (1951).

It is interesting that even Story's statement which gave currency to the domiciliary basis of divorce jurisdiction, did not purport to describe it as essential or exclusive. Story's remark related to a choice of law and not a jurisdictional problem, that is, to the power of the court of domicile to apply its own law rather than that of the place of marriage or where the offense was committed. Story wrote:

> "Upon the whole the doctrine now firmly established in America upon the subject of divorce is that the law of the place of the actual bona fide domicile of the parties gives jurisdiction to the proper courts to decree divorce for any cause allowed by the local law, *without reference to the law of the place of the original marriage, or to the place where the offense for which the divorce allowed was committed.*" Story, *op. cit. supra*, Section 230 (a) (emphasis supplied)

In 1823, Chancellor Kent described the divorce policies of the states as "exceedingly various." Kent, *Commentaries on American Law* 105 (1823). Kent expressly referred to divorces obtained in states other than those where the husband and wife "were married, and resided." His remarks are relevant to the present problem:

> "There can be no doubt that a divorce of the parties who are married and regularly domiciled at the time in the state where the court pronounced the divorce, would be valid everywhere. The difficulty is, when the husband and wife were married, and resided in a state where divorces are not permitted at all, by the policy

of its law, or not permitted to the extent and for the causes allowed to operate in other states; and that, where one of them, remove into another state for the sole and express purpose of procuring a divorce, and, having obtained it, return to their native state, and contract other matrimonial ties.

"According to the doctrine of the decisions in the federal courts, it may be contended that a divorce in one state, judicially conducted and declared and procured under circumstances which gave the court full jurisdiction of the cause and of the parties, and sufficient to render the divorce valid and binding there, would be good and binding in every other state and yet it is evident that the domestic policy of one state in this very interesting subject of divorce may in this way be exposed to be greatly disturbed by a different policy in another state. It may be proper in this work to leave the question as I find it; but if such a divorce will operate and conclude the question in every state, we are at least relieved from that changing and distressing collision which exists between judicatures of England and Scotland on this subject; and the appeal must be made to the mutual comity, moderation, and forbearance of the legislatures of the several states in their respective regulations on the subject of divorce." Kent, *op. cit. supra*, at 107-110.

In the few early records that are available as to the exercise of divorce jurisdiction in Colonial America, we have found a Connecticut case in which the Superior Court in 1773 granted a divorce althought the court felt that neither party was domiciled in Connecticut. The complete report of the court's proceedings is as follows:

"Rawson (v. .....): Petition for Divorce. Cause Savitia [probably saevititia, i.e., cruelty] and for Desertion. She and her Husband belonged to Yarmouth in Massachusetts Bay. (I)n consequence of their contention and separation she came into this Colony two years ago and means to continue here as her Husband refuses to let her come home or to live with him. The Court had some doubt on the score of her not being an Inhabitant in this Colony (as she could not be

> because her Husband remained at Yarmouth), but the Husband consenting, by Letter, Petition granted." The American Historical Association, *The Superior Court Diary of William Samuel Johnson*, 1772-1773, p. 231 (1942).

It is clear that the doctrine of domicile in divorce jurisdictions was not a part of the common law at the time of the American Revolution or when the Constitution was adopted.[31]

The doctrine was not part of the common law of England in 1787. Divorce *a vinculo matrimonii* was granted in England only by Act of Parliament. The English ecclesiastical courts could grant limited relief, presumably to any member of the church, wherever he might make his home.[32] It was not until 1857, however, that the common law courts in England were given authority in divorce cases. See 20 and 21 Vict., c. 85.

Indeed, there seems to be general agreement that the doctrine of domicile was not firmly established in England until 1895 in *Le Mesurier* v. *Le Mesurier* (1895) A.C. 517 (P. C.), which also related to extra-territorial validity of divorce decrees. (See p. 36, *infra*, as to the recent legislative repeal of the holding in Le Mesurier).[33]

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[31] "The early New York cases * * * would seem to indicate that jurisdiction over the subject matter of divorce might exist in some other state than that of the domicil." Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 Col. L. Rev. 373, 386 (1940).

[32] Radin has suggested that the doctrine of domicile is traceable to the fact that the ecclesiatical courts granted divorces only to church members. Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 Ill. L. Rev. 1, 31 (1944). See Madden, *Personal and Domestic Relations* 256-261 (1931).

[33] The dissenting opinion below (per Hastie, J.) sums up the situation as follows (207 F. 2d at 681):

> "Thus, we seem to have the curious chronology of the American courts adopting a rule of practice in the first half of the nineteenth century under the influence of the creative scholarship of a distinguished writer, the British courts adopt-

### 3. The Concept of Domicile

It seems reasonably clear that domicile is a troublesome concept which should be resorted to only where policy allows no alternative or statesmanship can suggest no substitute. Justice Rutledge referred to "the ways the Court has travelled in a domiciliary wilderness . . ." *Williams* v. *North Carolina II*, 325 U. S. 226, 244 (dissent). In *Texas* v. *Florida*, 306 U. S. 398, 429, members of this Court said that domicile "tends to be a less and less useful fiction." (Opinion of Frankfurter and Black, J.J.).

Certainly a doctrine of this nature does not deserve to be enshrined as a constitutional requirement. On the contrary, every encouragement should be given to its elimination by legislative action which, as is the case here, takes full account of the substantial values involved.

### 4. Current Departures From Domiciliary Concepts

A decision that domicile is a constitutional imperative would frustrate development and experimentation in the highly involved and dynamic field of divorce law. It is significant that legislation enacted in the British Commonwealth in recent years has provided for divorce jurisdiction in certain circumstances on the basis of residence rather than domicile. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 197 (1951). The *Indian and Colonial Divorce Jurisdiction Act*, 1926,[34] according to Dean Griswold "clearly recognized that a divorce might be granted by the courts of a state in which the parties were not domiciled." Griswold, *op. cit. supra*, at 197. As a consequence of subsequent extensions of the Act, "the result of *LeMesurier* v. *LeMesurier* itself was expressly overturned."

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ing this doctrine in the latter half of the nineteenth century, and now in mid-twentieth century, American judges saying that the doctrine is one of those fundamental ideas which must be read into the original provisions of our Constitution."

[34] 16 and 17 Geo. 5, c. 40.

*Ibid.* Other legislation has been enacted in the British Commonwealth which also clearly departs from the theory that a divorce may be granted only by the courts of the domicile. Under the Matrimonial Causes Act, 1950,[35] a wife may obtain a divorce in case of desertion or deportation of her husband if she is resident in England and has been residing there for three years preceding the commencement of the proceedings.[36] Dean Griswold reports that in England the wife's domicile remains that of her husband but the effect of the statutes is that "English courts may now grant divorces in many cases where the parties are not domiciled in England and indeed, where the defendant has never been domiciled in England". Griswold, *Id.* at 200; see also Garland, *Domicile and Divorce*, 103 Law Journal 602 (1953).

These changes in English law have come about in response to changing conditions and the needs of the people. Wartime population shifts accelerated the development. Whatever one's views may be as to the desirability of the domiciliary rule, the English developments indicate that it would be extremely unwise to elevate domicile to constitutional status, and thereby foreclose the possibility of legislative adjustment to changing needs.

Illustrative of such adjustment is a Kansas statute providing that a plaintiff in a divorce action "must have been an actual resident in good faith of the state for one year, . . . provided that any person who has been a resident of any U. S. Army post or military reservation within the State of Kansas for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to said United States Army Post or military reservation." Decisions prior to this enactment had established that soldiers resident on an Army post were not thereby "domiciled" for divorce purposes. In

[35] 14 Geo. 6, c. 25 § 18.

[36] This does not appiy if the husband is domiciled in any part of the United Kingdom, or the Channel Islands, or the Isle of Man. Griswold, *op. cit. supra*, at 199.

*Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936), the Supreme Court of Kansas held that the foregoing statute required the court to exercise jurisdiction in a divorce action brought against a soldier despite the absence of domicile. No due process issue was raised. The court pointed out that the legislature might have found it inadvisable to remit soldiers to their domicile of origin in order to seek a remedy as to their marital status. We submit that it would be highly undesirable to hold that the Federal Constitution prohibits states from making practical provisions of the sort that the Kansas statute exemplifies.[37]

A holding that domicile is a constitutional requirement to divorce jurisdiction would also strike down a New York statute authorizing the Courts of that state to grant a divorce "where the parties were married within this state." N.Y. Civ. Pr. Act § 1147. It has recently been held in construing this provision that neither domicile nor residence of either party is necessary, and that "marriage within the state is a fact sufficient of itself to enable a state to confer upon its courts jurisdiction of an action to dissolve that marriage." *David-Zieseniss* v. *Zieseniss*, 129 N.Y.S. 2d 649, 205 Misc. 836 (Sup. Ct. 1954), noted 54 *Col. L. Rev.* 1165 (1954). In response to the contention that domicile was essential to divorce jurisdiction, the Court said:

> "To assert generally and broadly that jurisdiction of divorce depends upon or is founded upon domicile in such a way as to imply that jurisdiction cannot be founded upon any other fact, is simply to say something which is palpably contrary to the statutory law of New York as it has existed for over ninety years, and contrary, also, to Gould v. Gould, 235 N.Y. 14, 138 N.E. 490, in which our Court of Appeals went so

[37] New Mexico dealt with the same problem by creating a presumption of domicile for servicemen based upon one years presence at a military base in New Mexico. *Crownover* v. *Crownover*, 274 P. 2d 127 (N.M. 1954).

far as to recognize as valid here a foreign decree of divorce rendered in a place (France) where it said neither spouse was domiciled."[38] 129 N.Y.S. 2d at 653.

If the domicile concept is incorporated into the due process clause, Congress could not adopt, if it should wish to do so, a law allowing government employees resident in the District of Columbia for a long period, but domiciled elsewhere, to use its courts for divorce purposes.[39] It would also limit the Congress in endeavoring to aid the states and the courts in divorce administration by use of its power to legislate under the full faith and credit clause. A bill for this purpose has twice passed the Senate. See 99 Cong. Rec. 4575 (1953); S. 39, 83d Cong., 1st Sess., and S. Rep. 113. That bill is based specifically on the theory that recognition may be compelled of a decree of divorce on the basis of either domicile or personal jurisdiction of parties. The bill provides that a decree "must" be given full faith and credit in every other state as a dissolution of a marriage provided "the state wherein the decree was rendered was the last state wherein the spouses were domiciled together as husband and wife, *or the defendant in the proceeding for divorce was personally subject to the jurisdiction of the state wherein the decree was rendered or appeared generally in the proceedings therefor.*" (Emphasis supplied). If it is unconstitutional to provide for the exercise of divorce jurisdiction without domicile, the italicized portion of this bill is nugatory, and any future effort by the Congress to use its powers to ameliorate the difficulties as to divorce jurisdiction involved in our federal system, would be drastically handicapped. *Cf.* Lorenzen's suggestion for

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[38] Accord: *Oettgen* v. *Oettgen*, 196 Misc. 937, 94 N.Y.S. 2d 168 (1949); *Schildkraut* v. *Schildkraut*, 226 App. Div. 747, 233 N.Y.S. 585 (1929).

[39] *Cf.* the action taken by the Congress to abandon exclusive use of domicile for tax purposes and to substitute a scheme of taxing domiciliaries and non-domiciliaries who maintain "a place of abode" for a specified period. D. of C. Code § 47-1551c (s) (1951 ed.). See *District of Columbia* v. *Murphy*, 314 U.S. 441.

a fixed period of residence, *Haddock* v. *Haddock Overruled*, 52 Yale L. J. 341, 352 (1943); See also, Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54 (Jan. 1954).

**5. The Supposed Interests of the "Domiciliary" State**

We also submit that the desirability of a rule in this country that the domicile of one spouse is necessary for divorce jurisdiction is by no means so clear, nor is its importance of such magnitude, as to justify its being regarded as a constitutional requirement which the states and territories cannot alter. The usual arguments as to the paramount interest of the domiciliary state in the regulation and dissolution of marriage are highly debatable. Some of the offsetting considerations are these: (1) It is by no means clear that the divorcing spouse always or in most instances returns to the state in which that spouse resided while married. Divorces often lead to remarriage; spouses, particularly wives, after divorce often go elsewhere. (2) In our complex and mobile society, many persons have important connections with more than one state; for example they may have their homes in Connecticut and work in New York; they may move from state to state; they may have homes in more than one state. (3) "When we recall the extremely technical meaning of the word 'domicile' in Anglo-American law, we see at once that a person may be domiciled in a given state without being in any realistic sense a member of that community; he may have no home there and have no intention of ever returning there. If, therefore, the rule in question is to be based upon social reality, mere technical domicile should be insufficient; actual residence in the place as one's home should be necessary." Cook, *The Logical and Legal Basis of the Conflict of Laws* 465 (1942). (4) The major values involved in matrimonial disruptions are not technical, political or geographical; they are not the theoretical concern of a body politic. They are highly personal, such as

cultural and moral factors, the welfare of children, the opinion of others, business matters, and the like.

In fact, the real interest of the "domiciliary" state has been so reduced by our changing society that it is of little or no importance. This has been reflected by developments in the law. We discarded the fundamental principle upon which solicitude for the interests of the domiciliary state in the marital status of its citizens was based, when, in response to the realities of modern life and in accordance with developments of legal and social thinking, we abandoned the concept of "matrimonial domicile"—that husband and wife have a single home jurisdiction which is the "situs" of the marriage. Each spouse may, under our law, have a separate and different domicile, and the jurisdiction in which either is domiciled may grant a divorce, valid everywhere. *Williams v. North Carolina I*, 317 U.S. 287. The marital policies of the state in which one spouse is domiciled may differ radically from the policies of the state in which the other spouse resides. If the husband is domiciled in New York and the wife in Illinois, it is somewhat strained, we suggest, to urge that there is a domiciliary state whose interests in the marriage are so basic as to justify a constitutional monopoly.[40] The court granting an *ex parte* divorce may take account of the marital policies of *that* state of domicile, but it does not take account of the policies of the state in which the other spouse is domiciled. Nor does it assure that the court will have an opportunity to consider the interests of both parties. It would be curious to require compulsory recognition of divorce decrees in such a case despite the absence of personal jurisdiction over the defendant while full faith and credit were withheld where both parties were before the court and the court could consider their interests and evaluate their contentions.

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[40] See generally, *Divorce Without Domicile: Two Views on the Virgin Islands Statute*, 39 Cornell L. Q. 275 (1954).

The Court of Appeals reasoned that "adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens" (207 F. 2d at 676). But states other than the jurisdiction in which the parties are domiciled may and often do effect changes in their domestic relations. For example, domiciliaries of State A may be married in State B, in deliberate disregard of the laws and policies of A as to such important matters as age, prohibition against remarriage after divorce, degrees of kinship, race, and the like.[41] It has been frequently held that the state where the marriage was celebrated, though not the domicile of either party at the time of suit, may enter decrees annulling a marriage if both parties are personally subject to the jurisdiction of the court. *Feigenbaum* v. *Feigenbaum*, 210 Ark. 186, 194 S. W. 2d 1012 (1946); *Titus* v. *Titus*, 115 W. Va. 229, 174 S. E. 875 (1934); *Sawyer* v. *Slack*, 196 N. C. 697, 146 S. E. 864 (1929); *McDade* v. *McDade*, 16 S. W. 2d 304 (Tex. Civ. App. 1929).[42]

Moreover, the decisions of this court upon which we comment hereinafter have also vastly reduced the importance of domicile. See *May* v. *Anderson*, 345 U.S. 528, 538 (Jackson, J., dissenting). Certainly, the doctrine is not entitled to the status of an ineluctable constitutional requirement restricting state power.

### B. FULL FAITH AND CREDIT

1. This case does not present any question concerning the extra-territorial effect of a divorce decree granted in the Virgin Islands pursuant to the statute in issue. The Court of Appeals, we believe, was clearly wrong in con-

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[41] Such marriages are valid in the state where celebrated, in other jurisdictions, and more frequently than not in the domiciliary state. *Loughran* v. *Loughran*, 292 U. S. 216, 223; *McDonald* v. *McDonald*, 6 Cal. 2d 457, 58 P. 2d 163 (1936); see Goodrich, Conflict of Laws § 117 (3d ed., 1949).

[42] Contra: *Turner* v. *Turner*, 85 N.H. 249, 157 A. 532 (1931); *Antoine* v. *Antoine*, 132 Miss. 442, 96 So. 305 (1923).

cluding that unless a decree is entitled to full faith and credit it conflicts with the due process clause. In the various cases in which this Court has refused to compel full faith and credit of divorce decrees, it has never held that invalidity in the granting state under the due process clause followed from refusal to extend full faith and credit.[43] Of course, a decree granted by a court which lacks jurisdiction to render a judgment valid by tests of due process, is invalid at home and may not be enforceable in other states. *Old Wayne Mutual Life Ass'n.* v. *McDonough*, 204 U.S. 8. But the converse is not true. A statute or decree may be valid in the enacting state even though it is not entitled to compulsory recognition elsewhere. *Pink* v. *A. A. A. Highway*, 314 U. S. 201.[44] In his oft-quoted dissenting opinion in *Yarborough* v. *Yarborough*, 290 U.S. 202, 214-215, Mr. Justice Stone stated: "... this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they may have at home, and there are some to which the full faith and credit clause gives no force elsewhere."[45]

There is, of course, no reason why states may not "extend recognition when they could not constitutionally be required to do so." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 30 (1945). The New York Court of Appeals recognized the validity of a French divorce, although the parties were domiciled in New York at the time of the French decree. *Gould* v. *Gould*, 235 N.Y. 14, 138 N. E. 490 (1923). By the

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[43] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 936 (1945); Lorenzen, *Haddock* v. *Haddock Overruled*, 52 Yale L.J. 341, 349, n. 34 (1943); fn. 29, *supra*.

[44] Mr. Justice Frankfurter has pointed out that "A divorce may satisfy due process requirements, and be valid where rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory." *Sherrer* v. *Sherrer*, 334 U.S. 343, 369, fn. 16 (dissenting opinion).

[45] See Baade and Williams, *Constitutional Checks on Collusive Invasion of Jurisdiction in Matrimonial Actions*, 4 Duke Bar Journal 55, 58-64 (1954).

same token, a state may, if it chooses, give full effect to Virgin Islands divorce decrees even if it is not compelled to do so by reason of Art. IV, Section I of the Constitution. See *May* v. *Anderson*, 345 U.S. 528, 535 (Frankfurter, J., concurring).

The lower court's decision ascribes an unprecedented function to the full faith and credit clause. That clause is a vital instrument of our federal system, designed in appropriate circumstances to compel recognition throughout the union of the acts of any part of the union. See *Johnson* v. *Muelberger*, 340 U.S. 581, 584. It is not an instrument for federal dictation to the states and territories of what they may or may not do within their own borders, except where the recognition or enforcement of the "public acts, records, or judicial proceedings" of another state is involved. The full faith and credit clause may not properly be invoked to impose uniformity of policy upon the several states in derogation of the Tenth Amendment which reserves jurisdiction over marriage and divorce to the states. *State of Ohio ex rel Popovici* v. *Agler*, 280 U.S. 379, 383. Our federal system is designed to permit and even to promote diversity of policy within the limits of specific constitutional prohibitions. To use the full faith and credit clause to invalidate a state law in the circumstances of this case is, we submit, to expand federal jurisdiction far beyond the limits of our constitutional system.

The decision below, however, uses the full faith and credit clause in this novel fashion. Because it assumes that a decree under the Virgin Islands provisions would not be entitled to compulsory recognition, it argues that the decree would therefore be invalid in the granting jurisdiction. It reaches this result by equating due process and full faith and credit—a process which converts the full faith and credit clause into a constitutional limitation upon the power of a state to legislate within its own borders independently of any conflict with the laws of other states.

We submit that this result is not permissible, and that the incidence of the full faith and credit clause is irrelevant to this proceeding which concerns only the validity of the statutory provision within the Virgin Islands.

2. However, we submit that it is incorrect to assume that a decree of divorce entered under this provision of the statute would not be entitled to full faith and credit. It will be remembered that the provision is available after proof of six weeks' residence and only if the defendant is personally served within the jurisdiction or enters a general appearance. Then and only then does the statute provide for jurisdiction "without further reference to domicile," *i.e.*, without proof of domiciliary intent.

This Court has held that in circumstances where both parties are personally before the court, a divorce decree cannot be collaterally attacked in the domiciliary state, but must be recognized under the full faith and credit clause as between the parties and those in privity with them. *Sherrer* v. *Sherrer*, 334 U.S. 343; *Coe* v. *Coe*, 334 U.S. 378. This is true even though the "undisputed facts" show that the jurisdictional requirements of the granting state were not fulfilled. *Johnson* v. *Muelberger*, 340 U.S. 581.

In the foregoing cases the divorce decree was granted under conventional statutes requiring proof of domiciliary intent as well as a period of residence in order to obtain jurisdiction. Their theory appears to be that since the defendant had an opportunity in the divorce proceedings to contest domicile, and since he could not collaterally attack the adjudication in the granting state, the "domiciliary state" is prevented by the full faith and credit clause from permitting him to attack the decree in a subsequent proceeding. In the present case, the defendant voluntarily entered a general appearance in the action. He has not objected to the plaintiff's claim of jurisdiction. He has not complained of the lack of "domicile." He is in substance in the same position as the defendants in the cases cited above. The only difference is that in the

foregoing cases, the defendants had a theoretical right to direct an attack upon the plaintiff's alleged domicile. We cannot believe that the presence or absence of this theoretical right should or will determine whether full faith and credit must be accorded to a divorce decree.

The remaining question is whether a divorce decree under the Virgin Islands provision would be entitled to compulsory recognition as against the "domiciliary state." In *Williams II* it was held that the state could maintain a bigamy prosecution against persons who had remarried after an *ex parte* divorce in Nevada obtained without satisfying the requirements of Nevada law for domicile. We do not know whether *Williams II* is restricted to *ex parte* divorce situations of the type at issue in that case. We do not know whether, for example, in *Johnson* v. *Muelberger*, *supra*, the Johnsons could have been prosecuted for bigamy by New York State on account of remarriage after the Florida divorce in which both appeared.

We believe, however, that the situation where both parties are before the court is fundamentally different from that presented in *Williams II*. In the latter, involving an *ex parte* decree, elements of fraud upon the other spouse and the lack of the safeguards afforded by personal jurisdiction over both parties, are powerful factors of importance to the substantial values concerned. It is therefore entirely possible that this court would not extend *Williams II* to a situation in which both parties appeared and were personally subject to the jurisdiction of the divorce court, but would hold that in the latter situation, the divorce decree is entitled to full faith and credit, not only as against the parties and those in privity with them, but also as against the state.

If this is so, we suggest that a decree granted under the second provision of the Virgin Islands law would also bar a subseqent attack by another state, as well as by either party. Indeed, the Virgin Islands case would present a more appealing situation for the complete application of full faith and credit. In that case, the parties would have

fully and honestly complied with the jurisdictional requirements of the granting state. The elements of fraud or deception involved in obtaining jurisdiction under domicile statutes would not be present.

In terms of policy, then, and of the substantial values involved, it is our view that full faith and credit for all purposes should be accorded to decrees under the Virgin Islands provisions.

The recent decisions of this Court in this field have demonstrated a determination to deal with the problem in terms of the substantial values involved. "Domicile" is no longer a conceptual key with which the courts must seek to unlock all problems however badly the key may fit. The presence of domicile does not assure the out-of-state recognition of such incidents of divorce as alimony, property, or custody of children. *Estin* v. *Estin*, 334 U.S. 541; *May* v. *Anderson*, 345 U.S. 528. The absence of domicile does not mean that other states may refuse recognition to the divorce decree in litigation between the parties and those in privity with them. *Johnson* v. *Muelberger*, *supra*. The fact that divorce proceedings where both parties are before the court avoid fraud and imposition and make possible recognition of the real values at stake, has led to full enforcement of decrees therein; and the hardship and injustice that would result from a denial of full effect to such divorces have contributed to the same result. On the other hand, the unfairness, the danger and destructiveness of *ex parte* divorces[46] have induced, we think, a tendency to narrow their effectiveness as to property rights, children, and the dissolution of the marital status.

It is interesting to note that the English courts, faced with a problem, similar to our federal problem, of the recognition of divorce decrees among members of the Commonwealth, have reached the conclusion that extra-territorial recognition of divorce decrees must be accorded in

[46] See Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54-59 (1954).

certain circumstances even in the absence of domicile. In the recent case of *Travers* v. *Holley*, [1953] 3 Weekly L. Rep. 507, [1953] 2 All. E. R. 794, the Court of Appeals considered the effect of a decree granted under the Matrimonial Causes Act, 1950, where jurisdiction was based solely upon the residence of the wife, in the absence of domicile under British law. It held that a New South Wales decree was entitled to full recognition in England. The basis of its decision was that the courts of England would entertain jurisdiction under similar circumstances, but the case holds that domicile is not necessary for extra-territorial effectiveness. See Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 Harv. L. Rev. 823 (1954).

Judged by the standards of realistic regard for the real values involved, the second provision of the Virgin Island law should be held to be entitled to full faith and credit. The provision requires a period of residence sufficient to establish a reasonable connection between the jurisdiction and the parties. It does not attempt to make divorce available upon a casual or transitory connection between the territory and the parties. It requires the essential safeguard to justice that both parties be before the court. It is not available in an *ex parte* proceeding.

The statute will not lead to a multiplication of undesirable divorce practices, but will open the way to improvements in a number of respects. It will encourage the restriction of divorce jurisdiction to situations in which both parties are before the court, and may thereby induce a substantial decline in *ex parte* proceedings. It will make available in cases where both parties appear, and not in *ex parte* proceedings, a jurisdictional basis free from the uncertainties and the invitation to perjury that are involved in many current proceedings.

The essential basis of the statute is the requirement of six weeks' continuous presence in the district as well as general jurisdiction of both parties. This period is identical with that previously required in the Virgin Islands as well as in a number of states where juris-

diction is based upon domicile (see footnote 23, *supra*). It is a period of time sufficient to establish a reasonable relationship between the jurisdiction and the parties, which justifies the application of the jurisdiction's laws and judicial system to the adjudication of the plaintiff's marital status, especially since the defendant must also be before the court. It is a period of residence also adequate to assure that the institution of the action for divorce is the product of deliberation, and to serve as advance notice that the prospective plaintiff may, if the defendant appears or is personally served, invoke the processes of its courts for proceedings relating to the marital status.

There is no reason to anticipate that efforts will be made to lower the residence requirements below six weeks. Legislative policy as well as economic factors probably would prohibit the reduction of that period. Indeed, if such a temptation existed it would be more likely to be effective if the concept of domicile were retained, because domicile can be acquired in the twinkling of an eye, and the flicker of a thought—without any prior period of residence.[47]

The Virgin Islands provision will not impair the rights or interests of "domiciliary" states, assuming that these states have substantial interests (see discussion, p. 49, *supra*). The provision does not reduce the required period of residence. Insistence upon "proof of domicile" in Nevada, the Virgin Islands, or elsewhere does not change the realities of the situation—that persons go to these jurisdictions, that they establish "domicile" there in fact or fiction after six weeks' presence, and that they may subsequently return to their home or go elsewhere. "Proof of

[47] The Alabama Supreme Court recently stated in construing a domicile statute: "No particular or specific period of residence in this state [Alabama] is required of a complainant in a proceeding for divorce where the respondent is a non-resident when the court has jurisdiction of both parties to the cause of action, the only jurisdictional requirement being that the complainant be domiciled in this state so as to confer upon the court jurisdiction of the res." *Levy* v. *Levy*, 256 Ala. 629, 56 So. 2d 344 (1952).

domicile" does not satisfy any interests of our society. At best, it merely vindicates a text-book concept which has created much confusion and caused considerable hardship. At worst, it involves the practice of sham and deception which is damaging to our institutions, and infects the lives of divorced people and their children with needless peril and uncertainty.

The Virgin Islands law eliminates the "evasions and perjuries" incident to an insistence upon proof of domiciliary intent. It opens the way for lawyers honorably and confidently to represent clients who are involved in hopeless marital difficulties. See Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443, 463-464 (1953). It opens the door to the elimination of sham and deceit in an area of the law which touches the lives of thousands of citizens. We cannot believe, as the lower court holds, that the Bill of Rights is an insuperable bar to legislative amelioration of these conditions.

We respectfully submit, therefore, that the statutory provision under consideration is valid regardless of the application of the full faith and credit clause; and that, in any event, a decree entered pursuant to the provision would be entitled to full faith and credit.

## CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be reversed.

Respectfully submitted,

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December 15, 1954

## APPENDIX A

**Divorces Granted in the Virgin Islands**
**St. Thomas and St. Croix**

| Year | St. Thomas | St. Croix | Total |
|---|---|---|---|
| 1940 | 16 | 18 | 34 |
| 1941 | 28 | 9 | 37 |
| 1942 | 34 | 15 | 49 |
| 1943 | 63 | 13 | 76 |
| 1944 | 45 | 18 | 63 |
| 1945 | 38 | 14 | 52 |
| 1946 | 64 | 26 | 90 |
| 1947 | 104 | 20 | 124 |
| 1948 | 132 | 11 | 143 |
| 1949 | 160 | 21 | 181 |
| 1950 | 244 | 27 | 271 |
| 1951 | 284 | 32 | 316 |
| 1952 | 310 | 33 | 343 |
| 1953 | 215 | 21 | 236 |

## APPENDIX B

BILL NO. 54

THE 17TH LEGISLATIVE ASSEMBLY OF THE VIRGIN ISLANDS OF THE UNITED STATES 1953, SECOND SESSION

An Act to amend "Law Concerning Actions to Declare Void or Dissolve the Marriage Contract, and for other purposes" approved December 29, 1944.

Be it enacted by the Legislative Assembly of the Virgin Islands in session assembled:

That Sections 8 and 9 of the "Law Concerning Actions to Declare Void or Dissolved the Marriage Contract, and for Other Purposes" approved by the Governor December 29, 1944, be and the same are hereby amended to read as follows:

"Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is physically present in the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has

been physically present in the district for six weeks prior to the commencement of the action.

"Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plaintiff therein must be physically present in the district at the commencement of the action and for six weeks prior thereto, which physical presence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose."

PROPOSED BY
COMMITTEE OF THE WHOLE

## APPENDIX C

GOVERNMENT HOUSE

Charlotte Amalie
St. Thomas
Virgin Islands of the United States

April 22, 1953

The Honorable
The Chairman of the Legislative Assembly
Christiansted,
St. Croix, Virgin Islands

My dear Mr. Chairman:

I regret that I must return herewith, without executive approval, Bill No. 54 of the Seventeenth Legislative Assembly of the Virgin Islands of the United States, Second Session, 1953, An Act to Amend "Law Concerning Actions to Declare Void or Dissolve the Marriage Contract, and for other Purposes," approved December 29, 1944, passed by the Legislative Assembly of the Virgin Islands on March 27, 1953, and presented to me on April 15, 1953.

This bill purports to amend the divorce law of the Virgin Islands by providing that six weeks sojourn or physical presence in the Virgin Islands shall be equivalent to "domicile" for divorce purposes. Its enactment followed a decision of the District Court of the Virgin Islands to withhold any further divorce decrees, under the local divorce law, in cases where the plaintiff is not a bona fide resident of the Virgin Islands, in accordance with an opinion of

the United States Court of Appeals for the Third Circuit rendered on April 16, 1952.

As I stated on March 31, 1953, it is my opinion that the accompanying Bill, as passed by the Legislative Assembly does not meet the legal objections raised by the opinion of the United States Circuit Court of Appeals for the Third Circuit although it does seem to dispose of certain ethical objections. Having given due weight to all the legal, all the ethical, all the moral, and all the economic factors involved, I am still of the opinion that this Bill should not be allowed to become law. I may add that this opinion is now shared by a majority—if not all—of the members of the Bar Association of the Virgin Islands.

It has been suggested that the enactment of a new amendment to the divorce law of the Virgin Islands should be made to provide that residence of the plaintiff in the Virgin Islands at the time of the filing of the complaint and continuously for six weeks immediately preceding the filing of the complaint would be sufficient to give the District Court jurisdiction to grant divorce in those cases only where the defendant is personally served within the district or enters a general appearance in the action. My objection to the earlier amendment was based principally on the granting of divorce decrees upon complaint of a plaintiff after six weeks residence without the appearance of the defendant in the action or without a personal service of the complaint upon the defendant. If legislation is adopted eliminating this objection, that is, providing that six weeks residence would be sufficient to grant the court jurisdiction when complaint is personally served upon the defendant in the district or when the defendant enters a general appearance in the action, it is my opinion that the moral objection shall have disappeared.

Accordingly, I have no recourse but to veto, which I hereby do, Bill No. 54 which is returned herewith to the Legislative Assembly. If the Legislative Assembly of the Virgin Islands in its wisdom should amend the divorce law of the Virgin Islands, substantially as suggested above, I shall allow such amendment to become law.

Sincerely,

MORRIS F. DE CASTRO
*Governor.*

## APPENDIX D

I, GEORGE A. MENA, Clerk of the District Court of the Virgin Islands, DO HEREBY CERTIFY that a detailed survey of the records of the District Court of the Virgin Islands for the Municipality of St. Thomas and St. John, at Charlotte Amalie, shows the following facts:

| | |
|---|---|
| Divorce Cases Concluded in 1952 | 310 |
| Cases in which Answers were filed and General Appearances entered | 257 |
| Cases in which Answer was filed but no Appearance | 1 |
| Cases in which Special Appearances or the Equivalent were made to contest Jurisdiction* | 4 |
| Cases discontinued** | 13 |
| Cases in which No Answer filed and no Appearance | 31 |
| Cases in which Contest resulted in trial of issues as to Jurisdiction and Merits in which the parties appeared as adversaries*** | 2 |
| Cases in which Cross-bill filed | 2 |
| Total | 310 |

* Two were by "answer" to the jurisdictional allegations, reciting special appearance; one by motion; and one by letter.

** Two discontinued after hearing; 7 before Answer; 4 after Answer. In some of these discontinuance followed the raising of jurisdictional issues by informal communication.

*** 1. In Civil 67-1952 defendant appeared in person and by attorney, filed answer and cross complaint. Trial by Court and decree, entered.

2. In Civil 318-1952, defendant filed "Answer and Waiver", and appeared and testified at trial by Court. Decree entered.

Dated, March 24, 1954.

GEORGE A. MENA
*Clerk of the District Court*
*of the Virgin Islands,*
*Charlotte Amalie, V. I.*

## APPENDIX E

In The

District Court of the Virgin Islands

Division of St. Thomas and St. John
At Charlotte Amalie

---

Civil No. 295-1953

Action for Divorce

---

Charles Rudolph Fenton, *Plaintiff*,
v.
Inez Dixon Fenton, *Defendant*.

---

### Order

This matter came on for hearing February 1, 1954 on the motion of defendant for dismissal of the action herein for alleged lack of jurisdiction of the Court over the plaintiff;

Defendant appeared specially by her attorneys, Maas & Bailey (David E. Maas, Esq., of counsel);

Plaintiff appeared in person and by his attorneys, Dudley, Hoffman & McGowan (G. H. T. Dudley, Esq., of counsel);

After examining plaintiff and hearing argument on the motion, the Court being satisfied in the premises; it is hereby

Ordered, that said motion be and the same is hereby denied; and it is

Further Ordered that plaintiff pay to attorneys for defendant the following sums:

| | |
|---|---|
| $175.00 | for transportation of defendant to the jurisdiction for the purpose of appearing in the within action; |
| $ 50.00 | for hotel expenses of defendant while in the Virgin Islands; |
| $100.00 | for preliminary counsel fees for representation of defendant; |

and it is

FURTHER ORDERED that upon payment of said funds to attorneys for the defendant as aforesaid defendant shall file her answer herein on or before March 3, 1954 and the plaintiff shall reply thereto, if necessary, on or before April 3, 1954; and that trial of the cause is hereby set for May 28, 1954, or earlier upon prior notice and approval by the Court.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Court to be affixed this 19th day of February, 1954.

HERMAN E. MOORE
*Judge*

Attest:
/s/ George A. Mena
GEORGE A. MENA
*Clerk*

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FEB 1 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF FOR THE PETITIONER

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February 1, 1955.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

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No. 261

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ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

---

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## REPLY BRIEF FOR THE PETITIONER

---

### I.

### THE BASIC ISSUE

The distinguished Amicus Curiae, appearing by invitation of this Court, supports the conclusion of the court below, but, as we read his brief, deserts its reasoning. The majority below held that, under the due process clause, domicile, together with its essential element of domiciliary intent, is a constitutional requirement for

divorce jurisdiction. Because of this view, they held invalid the second provision of the statute under consideration which provides for jurisdiction without reference to domicile where both parties are before the court. And largely, we believe, because the majority below regarded domicile as constitutionally required for jurisdiction, they invalidated the first provision of the law, providing for a procedural presumption of domicile based solely upon proof of continuous presence.

The Amicus does not adopt this due process argument. He agrees with our view that the due process clauses of the Federal Constitution do not require domicile for divorce jurisdiction. He agrees that there is no provision of the Federal Constitution which prohibits a state or territorial legislature from making appropriate provision for divorce jurisdiction without domicile.

It is this due process issue that has heretofore been regarded as fundamental to this case.

On page 42 of his brief, the Amicus states:

> "It may be that a State is free to proceed in divorce matters without domicile if it chooses to do so".

Equivalent statements appear at page 8, page 36, and page 38. On page 21, the Amicus asserts the same proposition with respect to the Virgin Islands:

> "We are not dealing here with a case of long-continued residence which for some reason did not amount to domicile. *It might be that the Virgin Islands Legislative Assembly would have authority to deal with such a case.*"

The kernel of the Amicus' attack is that he believes that this Court should forbid the Virgin Islands to provide for divorce jurisdiction upon six weeks' continuous presence in the islands rather than a longer period. He urges the Court to reach this result by finding that Congress did not empower the Virgin Islands to pass such a law; or that if

it did, Congress exceeded its authority under the Tenth Amendment. If the Court declines to adopt either of these arguments, he suggests that the legislation may be invalidated under the full faith and credit statute applicable to the territories because of the presumed intent of the legislature that Virgin Islands law, and not the divorce statutes of other jurisdictions, should be applied to the determination of the issues in the divorce proceedings.

We believe that each of these arguments is insupportable, and we shall discuss them specifically. But underlying the Amicus' arguments is the assumption that the consequences and implications of the validation of this law would be so injurious to political, social and legal values of this nation as to impel this Court to overrule the judgment of the Virgin Islands legislature. We recognize that in the important field of divorce, any innovation justifies serious inquiry and sympathetic concern; but it is our deep belief that the effect of validation of this law will not be harmful, but will be productive of good. Our analysis is set forth in the following section.

## II.

## THE PRACTICAL AND LEGAL IMPLICATIONS OF THE STATUTE

### A. THE PRACTICAL IMPLICATIONS

*If this Court reversed the decision below, what would the consequences be?*

1. In 1952, the Virgin Islands court granted 343 divorces. (Summary of Marriage and Divorce Statistics, United States, 1953, Vol. 40, No. 3, at 53 (U. S. Dept. Health, Edu. & Welf., Dec. 6, 1954)). This is its highest total for any single year. In 1951, its total was 312. (*Ibid*) In 1952, incomplete figures for the United States show a total of 392,000 divorces granted. (Id. at 51). The largest number was California, with 41,398 divorces. (Id. at 52).

We suggest that these figures indicate that Virgin Islands' divorces have not presented a major practical problem.

Prior to March 20, 1953, or at least prior to April 16, 1952, when *Burch* v. *Burch*, 195 F. 2d 799 (C. A. 3, 1952) was decided by the Court of Appeals, divorce petitions were entertained in the Virgin Islands without reference to domicile. (Pet. Br., pp. 7-8).

Since March 20, 1953, when the Virgin Islands' District Judge began vigorous enforcement of the domiciliary requirement laid down in *Burch*,[1] the volume of divorce petitions has declined.

We do not believe that approval of the present statute will make any great difference in the number of divorces granted in the Virgin Islands, as compared with 1952. In any event, we do not believe that the number will represent an important threat to any of the states.

Divorce in the Virgin Islands will not be easier than it was prior to *Burch* v. *Burch*. The period of residence or presence is unchanged. The Virgin Islands legislation requires six weeks of "continuous presence". This is a jurisdictional requisite. It is easily checked because of the remote and isolated position of the islands. Ingress and egress are recorded by the airlines and the steamships and can be checked in their records.[2]

Ample procedural safeguards are provided in the law and in practice.[3] The grounds of divorce are unchanged; and divorces obtainable in the Virgin Islands can alterna-

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[1] See *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954).

[2] This must be compared with the laws of Nevada and like jurisdictions which require six weeks "residence". This means "domicile". It does not necessarily require continuous presence for the prescribed period; and in any event, the geographical and transportation facts would make it difficult to check presence.

[3] See Pet. Br. pp. 22-25.

tively be secured in various states if the jurisdictional requirements are satisfied.[4]

2. We do not believe that if this law is declared valid, any effort will be made to reduce the residence requirement. Economic as well as social considerations would inhibit this. Indeed, validation of the present law would not necessarily imply approval of another law which provided for a lower and unprecedented period of residence. In the present law, the Virgin Islands merely continued an existing provision which had been in effect in St. Thomas-St. John since 1939, and which had been prescribed in Nevada since 1931 and in Idaho since 1937.[5] The continuation of this period, in our opinion, along with the general appearance of the defendant, establishes an adequate basis, or reasonable connection between the jurisdiction and the parties, for the Court to exercise its jurisdiction, and to apply the law of the forum; and for its decree to be entitled to full faith and credit. (See Pet. Br., pp. 42-51). It does not follow that if the Virgin Islands engaged in a competitive reduction of residence requirements, or otherwise lowered the residence period or other requirement of the law, the same conclusions would obtain.

3. We do not know whether other jurisdictions would adopt laws like the statute under consideration. It may be that Nevada, Florida and other "divorce" states are satis-

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[4] This is true not only of Nevada and other "divorce" states, but of many of the states which are not regarded as in this category. Reality is not always mirrored in the statutory grounds for divorce and parties to divorce proceedings usually allege and rely on the minimum and least distasteful grounds for divorce permitted by the forum, although other grounds may be available. *Cf.* the figures on divorces by states, *Appendix*. For example, the court will recall that the Altons who first sought a divorce in the Virgin Islands, on grounds of "incompatibility of temperament", were expeditiously divorced in Connecticut. *Alton* v. *Alton*, 347 U.S. 610. (See Connecticut decree in *Alton* v. *Alton* on file with the Clerk of this Court.)

[5] Nev. Stat. 1931, p. 161; Idaho Sess. Laws 1937, p. 131.

fied with their laws. We venture to suggest that adoption by various states of statutes patterned upon the Virgin Islands model, but retaining at least the present period of required residence, required by the respective jurisdictions, would be a wholesome reform because of the elimination of evasive or perjurious testimony which discredits the law and degrades its administration (See Pet. Br., pp. 31-32), and because of the greater certainty that would result.

4. We believe that a decision of this Court upholding the constitutionality of this statute will mark further progress along the road to enabling the attainment of a fair, comprehensible and practical legal structure within which legislative policy may evolve and judicial decision may operate with regard to the facts and the substantial values involved. This process began with the recognition by this Court of the unsuitability of the concept of "matrimonial domicile" to our society and the validation of divorces at the domicile of either spouse. *Williams* v. *North Carolina I*, 317 U.S. 287. It continued with the validation of divorces when both spouses appeared generally. *Sherrer* v. *Sherrer*, 334 U.S. 343; *Johnson* v. *Muelberger*, 340 U.S. 581; *Cook* v. *Cook*, 342 U.S. 126. It proceeded with the recognition of "divisible divorce":—of the separate factors involved in alimony, property and custody, on the one hand, and the severance of the marital relation on the other. *Estin* v. *Estin*, 334 U.S. 541; *May* v. *Anderson*, 345 U.S. 528.[6]

The present case presents to this Court an opportunity, in the second provision of the statute, to make clear that a legislature may dispense with the technical requirements of domicile in favor of an established period of continuous

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[6] The Court of Appeals for the District of Columbia, sitting *en banc*, held recently that an action for an original award of separate maintenance may be entertained in the District of Columbia *after* an *ex parte* Florida divorce without reaching the question of the validity of the foreign decree. *Hopson* v. *Hopson*, — F. 2d — (D. C. Cir. No. 11558, Jan. 20, 1955).

presence if the defendant is subject to the personal jurisdiction of the court, and that it may reduce the pitfalls and evasions of domicile where the statute carefully assures adequate notice and an opportunity, by special appearance, to contest the allegation of domicile.

More than 750,000 husbands and wives annually are involved in divorce proceedings in our country (See Summary of Marriage and Divorce Statistics, op. cit. p. 3, *supra*). This is a problem of major concern to our people and to our legal institutions. This Court should not close the door to substantive or procedural change. This is particularly true where, as here, the change is for the purpose of honesty and integrity in administration, and of clarity of standards and certainty in results.

### B. THE LEGAL IMPLICATIONS

1. The Amicus stresses his apprehension with respect to the constitutional questions involved in this case (Am. Br. 25), *but those difficulties exist only if this legislation is declared unconstitutional.* They do not exist if it is upheld, as we shall discuss.

The Amicus has candidly recognized that the reasoning of the majority below on the domicile issue is legally untenable. He also appears to recognize that it is socially undesirable to hold that domicile is constitutionally necessary, because this result would make it impossible to deal with situations of the sort involved in the recent legislation of the United Kingdom,[7] or in such decisions as *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954)[8] and *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936).[9] He is, therefore, forced to resort to an extraordinary application of the Tenth Amendment as a limitation upon the powers of Congress

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[7] See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 197-200 (1951).

[8] See Pet. Br. 20.

[9] See Pet. Br. 38.

and the territories; or alternatively, to the equally extraordinary position that the full faith and credit rule invalidates a divorce statute, because the legislature enacting the statute improperly, he argues, assumed that the law of the forum would be applied.

We submit that nothing more than a reading of the brief of the learned and distinguished Amicus is necessary to an appreciation of the havoc that would result from a decision along the lines that he suggests.

2. A decision supporting the constitutionality of the statute may be based upon simple conclusions of limited scope and finite implications. These conclusions are:

(i) The power to define divorce jurisdiction and procedure is vested in the legislatures of the states and the territories. Constitutional restraints upon their action will be applied only in extreme situations.

(ii) Domicile is the traditional and a permissible basis for divorce jurisdiction. It is not an indispensable, nor a constitutional, requirement.

(iii) A legislature may provide for jurisdiction to divorce upon such grounds as it may determine, provided that its action is not clearly unreasonable or arbitrary. Where a legislature retains an established period of residence or continuous presence within the jurisdiction, and requires service within the district upon the defendant or a general appearance by him, the court will not invalidate its judgment, nor will it hold that the legislature has no power to create a procedural presumption of domicile where adequate provision is available for contest. In these situations, jurisdiction is based either upon domicile, in the case of the presumption, or upon a connection between the jurisdiction and the parties which the Court cannot characterize as unreasonable. The jurisdiction may continue to apply its own law to the determination of proceedings for divorce; and decrees under the law will be entitled to full faith and credit on the usual basis.

3. This reasoning will not open the door to "transitory" divorces, mail-order divorces, or any other of the consequences that the Amicus raises. It will not increase the alleged invasion of the supposed rights, interests or policies of the states. It does not in substance change the existing situation. It merely keeps open the door to legislative reform, subject to judicial scrutiny, and it validates the strongly felt policy of one jurisdiction, the Virgin Islands, in favor of integrity and candor in divorce proceedings.

## III.

## THE AMICUS' POSITION

The Amicus agrees that domicile is not a constitutional requirement for divorce jurisdiction, p. 2, supra. If this is so, it would seem to follow that a state or territorial legislature, if it chooses, may eliminate from its divorce law the requirement of proof of domiciliary intent where both parties are before the court; or alternatively, that it may create a procedural presumption of domicile to be available in the absence of evidence as to domiciliary intent.

The Virgin Islands legislature did just this in the statute before the Court. It did not change the six weeks period of residence or continuous presence in the jurisdiction previously required for divorce jurisdiction. This period has been prescribed by the laws of St. Thomas—St. John since 1939 (Am. Br. p. 14). It is the same as the period provided in Nevada since 1931; in Idaho since 1937 (fn. 5, *supra*). It is not materially different from the sixty-day residence which Arkansas has provided since 1931,[10] and

[10] Ark. Acts 1931, p. 201; Ark. Stat. (1947) §34-1208. We greatly regret that in the Brief for Petitioner, p. 21, fn. 23, we mistakenly included Arkansas among those jurisdictions which provide for divorce on the basis of six weeks residence. Arkansas requires two months residence before commencement of the action.

Wyoming since 1935,[11] or the ninety days required by Florida since 1935[12] and by Utah since 1943.[13]

The legislature merely provided that proof of six weeks continuous presence would raise a procedural presumption of domicile operative only if no contervailing evidence were adduced, and that in cases where the defendant is personally subject to the court, such residence would be sufficient to give the court jurisdiction. In substance, the Virgin Islands legislature acted merely to make unnecessary in certain cases the proof of domiciliary intent, characterized as "frequently evasive or perjurious" by the Court below, and proof of which the Amicus agrees is not necessary under the due process clause or any other clause of the Constitution.

The Amicus nevertheless argues that both provisions of the Virgin Islands statute are invalid. Apart from a fleeting endorsement of the argument of the majority below that the first provision of the statute (the procedural presumption) is invalid as unreasonable within the rule of *Turnipseed* (Am. Br. pp. 18-19), the legal and constitutional basis for his position is entirely novel and differs from that of the court below. He construes both provisions of the statute as dispensing with any requirement of proof of domicile and, in general, his argument deals with them without distinction. Because the statute requires only six weeks residence and not a longer period, the Amicus construes the law as if its scope and application were entirely confined to offering a remedy to persons resident in the states and not in the Virgin Islands.[14] Solely be-

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[11] Wyo. Sess. Laws 1935, p. 25; Wyo. Comp. Stat. (1945) §3-5907.

[12] Fla. Laws 1935, p. 444; Fla. Stat. Anno. (1943) §65.02.

[13] Utah Laws 1943, p. 60; Utah Code Anno. (1953) §30-3-1.

[14] The Amicus does not refer to the application of the statute to cases like *Burch* v. *Burch*, 195 F. 2d 799 (C. A. 3, 1952), or *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), or to other cases where one or both of the parties are or become "domiciled" in the Virgin Islands.

cause of this implication which he derives from the limited residence requirement, he argues that the statute is beyond the authority of the Virgin Islands; and that it is beyond the powers which Congress could exercise or delegate because it is an unconstitutional interference with the states in violation of the Tenth Amendment. He urges the Court to decide the case on this ground in order to avoid constitutional issues. But if the Court declines to do so, he argues that the statute conflicts with the "requirements" of full faith and credit.

This is, of course, novel reasoning. It has never before been suggested in the cases involving the divorce laws of Nevada, Florida and other states—or in this case—that the Constitution required any particular period of residence or presence in a jurisdiction as a condition precedent to the exercise of power to hear and determine petitions for divorce. Even in this brief, the Amicus apparently does not attack the six weeks requirement in the laws of Nevada and Idaho where it is coupled with a requirement, however nominal in fact, of "domicile." But although he agrees that "domicile" is not constitutionally necessary, he argues that in the absence of domicile, the six weeks requirement (or presumably 60 days, as in Arkansas and Wyoming, or 90 days as in Florida and Utah, or perhaps six months as in North Carolina, would render a territorial statute offensive to the Federal Constitution. A "longer period", which the Amicus does not specify, or undefined "special and artificial" circumstances, according to the Amicus, might justify the departure from "domicile", (Am. Br. p. 37) but not the mere requirement of six weeks continuous presence even when coupled with the requirement that the defendant must be brought into the proceedings generally—a feature which the Amicus does not discuss.

## IV.

## THE FIRST PROVISION: THE PRESUMPTION OF DOMICILE

The Amicus agrees with the court below and petitioner that the statute contains two separate provisions (Am. Br. p. 2, Pet. Br. p. 9). However, contrary to the holding below, he construes the first provision, providing for a procedural presumption of domicile, as dispensing with the requirement of domicile (Am. Br. p. 20). Accordingly, he states that it is "not necessary" to consider the applicability of the law relating to presumptions (Am. Br. pp. 18-19), and he urges that the provision is invalid on the other grounds stated in his brief which are based upon the elimination of domicile. In a brief reference, however, he states that if it were necessary to apply the law of presumptions, the provision would be invalid thereunder.

### A. THE FIRST PROVISION RETAINS THE DOMICILE REQUIREMENT

This provision of the statute retains the requirement of domicile as clearly as language could do so. Section 9 of the Divorce Law, which was unchanged by the statute in issue, is the general jurisdictional provision of the Divorce Law. It requires proof of domicile (*Burch* v. *Burch*, 195 F. 2d. 799 (CA 3, 1952). Section 9(a), the first provision of the amending statute, (the provision under discussion), provides that "if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile."

Plainly, the legislature intended by this provision to retain domicile as a jurisdictional requirement. This requirement is eliminated only when the *second* provision of the statute becomes operative: *i.e.*, only when "the defendant has been personally served within the district, or enters a general appearance in the action." In other circumstances, domicile is as essential as it is in any jurisdiction operating under conventional statutes.

The Amicus, however, argues that this is form and not substance. He says it is merely "lip service" paid to domicile. With this we thoroughly disagree. If the proceeding goes forth under the first provision, domicile is a jurisdictional fact with the following consequences:

1. The defendant may appear specially, by counsel or in person, or even by informal communication (see Pet. Br. pp. 23-24), and may contest domicile. The presumption disappears upon introduction of any countervailing evidence; and the court will decide whether or not the plaintiff is domiciled in the district, and will exercise or refuse to exercise jurisdiction accordingly.

2. The court itself may and frequently does conduct its own examination as to the plaintiff's claim of domicile. (Pet. Br., 24-25; *Berger* v. *Berger*, 210 F. 2d 403 (CA 3, 1954). The effect of this is the same as if the defendant conducted the examination.

3. A decree rendered under this provision—that is, *ex parte*, because the defendant has neither appeared nor been served within the district[15]—may be collaterally attacked for want of domicile. The absence of domicile may be proved in the usual fashion. Proof of the want of domicile would deprive the decree of recognition under the full faith and credit statute. (*Williams* v. *North Carolina* (II) 325 U. S. 226; *Rice* v. *Rice*, 336 U. S. 674).

In view of these facts, we submit that it cannot be argued that this provision "makes domicile immaterial where the defendant is not before the court" (Am. Br. p. 20).

### B. THE PROCEDURAL PRESUMPTION IS VALID

The court below invalidated the presumption as unreasonable within the *Turnipseed* rule.[16] In our principal

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[15] St. Thomas—St. John is a district. St. Croix is a separate district. Revised Organic Act of the Virgin Islands of 1954, Section 25, 48 USC §1618.

[16] *Mobile, J. & K. C. C. R. Co.* v. *Turnipseed*, 219 U. S. 35.

brief, we analyze this problem at length, and urge that a rebuttable, procedural presumption of domicile based upon six weeks' continuous presence, where there is every safeguard to contest, is entirely reasonable. We point out that there is clearly "some rational connection between the fact proved and the ultimate fact presumed", as required by Turnipseed.[17] (Pet. Br. pp. 16-26).

In a few lines of his brief devoted to this subject the Amicus suggests that the presumption is unreasonable because it puts the burden "on the other party, who cannot possibly know as much about the facts relating to the plaintiff as the plaintiff does" (Am. Br. p. 19). The Amicus cites no cases, nor has our own research yielded any to support this original proposition. The power of the legislature to prescribe procedural rules and to create presumptions is extremely broad. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, 81. The application of due process depends upon a substantial showing that the person against whom a presumption operates is materially prejudiced. This does not turn upon questions of who is in possession of the facts, but upon a total consideration of the nature and effect of the presumption.[18] In a civil case, where the presumption has a rational basis; where it is entirely procedural and vanishes upon introduction of some countervailing evidence, it is not and cannot be prejudicial within the prohibitions of the due process clause.

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[17] 219 U. S. at 43.

[18] Many presumptions of undoubted validity have the effect of shifting the burden of going forward upon the less-informed party. For example: the presumption of ownership from continued possession of property (9 Wigmore *Evidence* Section 2515 (3d ed. 1940), and cases cited; cf. Id. Section 2522; the presumption of due care (*Duggan* v. *Bay State Street Ry. Co.*, 230 Mass. 370, 119 N. E. 757 (1918)), and in some cases, the presumption that a carrier is negligent (*Mobile* v. *J. & K. C. C. R. Co.* v. *Turnipseed*, 219 U. S. 35). See also the list of presumptions quoted in 9 Wigmore, Section 2499, n. 2, some of which are of the same character.

## V.

## THE LEGISLATURE IS AUTHORIZED TO ENACT THE STATUTE

### A. THE AMICUS' POSITION

The Amicus principally relies upon his argument that the statute in issue is beyond the powers vested in the Virgin Islands by the Congress. He urges this Court to affirm the decision below on this ground "in order to avoid the grave constitutional questions which will have to be considered if this legislation is regarded as authorized by Congress" (Am. Br., p. 6; see also p. 18; p. 23; p. 25; p. 45).

The court below, exceptionally familiar with the Virgin Islands and with the applicable territorial and constitutional law,[19] had no doubt of the authority of the Virgin Islands to enact this law. (207 F. 2d at 669).

The argument of the Amicus is based upon Section 19 of the Organic Act of 1936, 48 U. S. C. § 1405 r. The text of this section is as follows:

> "The legislative power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to said islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty entered into by the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."[20]

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[19] The Court of Appeals for the Third Circuit holds an annual session in the Virgin Islands. The judges of the court have taken great interest in the islands over a period of years. Circuit Judge Hastie is former Governor of the Islands. The judicial section of the Revised Organic Act incorporates suggestions by Judge Maris (Conference Report on S. 3378, 83d Cong., 2d Sess., Rep. No. 2105, July 9, 1954). See Judge Maris' exhaustive review of the history of divorce legislation in the Islands in *Burch* v. *Burch*, 195 F. 2d 799 (CA 3, 1952).

[20] The Revised Organic Act, Section 8 (a), repeats this language almost verbatim. The first phrase now reads "The legislative *authority and* power of the Virgin Islands * * *." 48 U.S.C. § 1574, approved on July 22, 1954.

According to the Amicus, the present law does not deal with a "subject of local application" (Am. Br. pp. 19-23).

In addition, the Amicus urges that the due process clause in the Organic Act of 1936 limits the Virgin Islands to legislating within the areas of jurisdiction which were "traditional" in 1936. He states that "When this statute [the Organic Act] was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases through the United States." (Am. Br., p. 24). Because of this, the Amicus argues that the Organic Act must be read as prohibiting the legislature from providing for divorce jurisdiction without requiring affirmative proof of domicile.[21] Accordingly, since the Amicus considers the first provision of the statute (providing a procedural presumption of domicile), as well as the second provision (providing for jurisdiction without reference to domicile where both parties are generally subject to the Court), as dispensing with domicile, he concludes that the law is "*ultra vires*".

These are extraordinary propositions. Their assertion is candidly motivated by a desire to provide this Court with a "way out". But it is a "way out" which would do violence to the meaning and intent of the Congress in respect of the Virgin Islands; reverse numerous decisions of this Court; subvert the commendable policy of the United States towards its territories—a policy which is of international significance; and create havoc in the Virgin Islands and in other territories such as Hawaii and Alaska and in the Commonwealth of Puerto Rico.

### B. THE STATUTE IS WITHIN THE AUTHORIZED LEGISLATIVE POWER OF THE VIRGIN ISLANDS

There is no dispute as to the fact that the Virgin Islands legislature has power to enact a divorce law (See Am. Br., p. 22). The Amicus argues, however, that the

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[21] Except for this argument, as we read his brief, the Amicus does not rely upon the due process clause of the Organic Act or of the Fifth Amendment to support his thesis as to the statute's invalidity.

Congress intended, by provisions of the Organic Act to limit the Virgin Islands' authority to laws of "internal" application, and not to authorize laws of "external" or "extraterritorial" application; that this law is "external" in intended application; and that it is, therefore, *ultra vires*. The Amicus apparently realizes that this argument might also invalidate the laws of various states, conspicuously of the "divorce" states like Nevada and Florida, and he expressly reserves the question as to the states (Am. Br., p. 29; p. 17 (B)). He disagrees with the conclusion of the Court below that, in matters of divorce legislation, the power of the Virgin Islands is "on a par with the States."[22]

1. *The Statute is not "Extraterritorial".*

The basic premise of the Amicus' argument is novel and, in our opinion, completely insupportable. This is not an "extraterritorial" law. The obvious points are:

(a) It is of general applicability within the Virgin Island.[23] It is available to and used by persons born in

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[22] The Amicus states, p. 17, that it was "faulty analysis" for petitioner to omit the following italicized words from the opinion of the Court of Appeals (207 F. 2d at 669):

> "Absent restrictions elsewhere, such a grant of power to a territory places it on a par with the States *as to all matters properly included in the grant.*"

But in the paragraph immediately following the Court of Appeals omitted the italicized words:

> "We think this language applied to divorce jurisdiction, puts the Virgin Islands on a par with the states, and overrides other restrictive provisions in Congressional legislation affecting the territories."

Elsewhere in its opinion, the Court noted that it was "analogizing the Virgin Islands to a state." 207 F. 2d at 676, fn. 30.

[23] A law is local when it pertains to a particular place or region, although it may be applicable to all persons within the area.

the islands and persons married there and residing there for many years,[24] as well as others. It may be invoked only by a plaintiff who is in the Virgin Islands and who has lived there for the prescribed period, and only in order to obtain an adjudication of his personal marital status.

(b) The effect of the law is exclusively internal. The law authorizes a decree operative in the Virgin Islands. It does not purport to, and could not, give decrees under it any extraterritorial effect. Any effect of such decrees outside of the Virgin Islands is derived from the action and authority of other governments: for example, as a result of the full faith and credit statute[25] or of comity.[26]

These propositions, we believe, are so clear that they

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*Funk* v. *Mulian Contracting Co.*, 197 Md. 192, 78 A. 2d 632 (1951); *State* v. *Johnson*, 170 N.C. 685, 86 S.E. 788, 792 (1915); *Shaw* v. *Fox*, 246 Ky. 342, 55 S.W. 11 (1932); *Mathews* v. *City of Chicago*, 342 Ill. 120, 174 N.E. 35 (1930).

[24] In 1952, 237 marriages were celebrated in the Virgin Islands. Summary of Marriage and Divorce Statistics, op. cit. p. 3, *supra*, at p. 53. An examination of records on file with the District Court of the Virgin Islands shows that its divorce jurisdiction is frequently invoked by persons who were born in the islands and have lived there all of their lives, as well as by persons who, although not natives, were married there.

[25] Act of March 27, 1804, c. 56, Sec. 2, 2 Stat. 298, 299; 28 U.S.C. § 1738.

[26] The Amicus cites *Buchanan* v. *Rucker*, 9 East. 191 (1808), "Can the island of Tobago pass a law to bind the rights of the whole world?" (Am. Br., p. 22). In that case, an English court refused to enforce a judgment *in personam* for money damages rendered in the Island of Tobago against a Defendant who, in the words of the Court, "never appeared to have been within the limits of the Island nor to have an attorney there," and who was served by a notice posted on the courthouse door on the Island. We agree that the Island of Tobago can bind no one by this sort of proceeding.

require no elaboration. The real argument of the Amicus seems to be that this law exceeds the delegated power of the legislature because it was not passed to meet a need of "Virgin Islanders", but to attract from elsewhere people seeking divorces. This may raise problems of federal constitutional law and policy such as those dealt with by the majority of the court below; but we submit that it does not render the statute one of "extraterritorial" character or beyond the limits of the Organic Act. On the contrary, it seems perfectly clear that the statute is well within the power of the Virgin Islands.

2. *The Statute.*

a. Congress intended to and did vest in the legislative assembly of the Virgin Islands legislative authority of a scope and character, with minor qualifications not material here, the same as is possessed by the states. The language used in the Organic Act of 1936 and substantially repeated in the Revised Organic Act of 1954, was intended as a plenary delegation of congressional power, with reservations not here relevant, to legislate for the islands. The limitation to "subjects of local application" is designed to make clear that Congress is not delegating federal or national power, but only "home-rule" authority.

The first statute enacted by the Congress to provide a temporary Government for the Virgin Islands, vested "all military, civil and judicial powers necessary to govern the West Indian Islands acquired from Demark" in officials appointed by the President until such time as Congress should provide for government of the Islands. (Act of March 3, 1917, c. 171, § 1, 39 Stat. 1132, 48 U.S.C. § 1391).

This law was superseded by the Organic Act of 1936, Act of June 22, 1936, c. 699, 49 Stat. 1807. In addition to Section 19, quoted p. 15, *supra*, Section 18, 48 U.S.C. § 1405q, provided generally that the municipal councils and the legislative assembly, within their respective jur-

isdictions, shall have power "to amend, alter, modify, or repeal any law of the United States of local application only, or any ordinance, public or private, civil or criminal, continued in force and effect by said sections, except as herein otherwise provided, and to enact new laws and ordinances not inconsistent with said sections and not inconsistent with the laws of the United States hereafter made applicable to the Virgin Islands or any part thereof, subject to the power of Congress to annul the same." Section 28, 48 U.S.C. § 1406, defining the jurisdiction of the District Court, expressly specified "All cases of divorce and annulment of marriage." And Section 19 itself, by excepting from the legislative power authority to enact law impairing rights existing or arising under United States treaties, emphasizes the breadth of the delegation.

In 1954, the Congress enacted the "Revised Organic Act of the Virgin Islands" which in Section 8 (a) substantially reenacts Section 19 of the 1936 law. Two points are to be noted in connection with this reenactment. (i) One of its general objects was to confer "a higher degree of self-government, both economic and political" upon the Virgin Islands. (House Com. Rep., 1603, 83d Cong., 2d Sess.) (ii) No amendment of the divorce law at issue here was made or even proposed in the elaborate consideration of the revised act, although the Committee were undoubtedly fully aware of it.[27] Congress, of course,

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[27] Virgin Islands Report Relative to Investigation and Hearings, etc., Sen. Comm. on Interior and Insular Affairs, 83d Cong., 2d Sess., Committee Print (1954), pp. 54-55, letter from Judge Moore. The "Table of Contents and Partial Index" to the Report lists Judge Moore's letter under the heading "Divorce law of the Virgin Islands". Senator Butler of Nebraska, chairman of the committee, conducted extensive hearings and investigations in the islands in November, 1953, when *Alton* v. *Alton* was pending. *Id.* at 2. Other members of the Senate and House committees visited the islands.

has the power to annul laws of the Virgin Islands. (Cf. 48 U.S.C. § 1405q in which Congress expressly retained power to annul laws of Legislative Assembly). Its re-enactment of the Revised Organic Act may be regarded as ratification of the divorce law here in issue.[28]

3. *Other Territorial Statutes.*

Equivalent phrases used by Congress in other territorial organic legislation make clear that it has been the consistent policy of the Congress to grant full "home rule", and also illustrates that there is no absolutely felicitous phrase to accomplish the result.

In the Territory of Oregon, for example, the organic law provided that the legislative power of the assembly would "extend to all rightful subjects of legislation . . ." In *Maynard* v. *Hill*, this was held to authorize the granting of a divorce "when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature." (125 U.S. 190, at 209).

The same words are used to define the scope of the legislative power of Alaska[29] and Hawaii.[30] In legislating for Puerto Rico, the Congress provided that the legislative authority "shall extend to all matters of a legislative character not locally inapplicable . . ."[31] All of these laws,

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[28] It may also be regarded as ratification of, or certainly acquiescence in, the construction of the Organic Act by the Third Circuit, and perhaps specifically of its view that the power of the Virgin Islands legislature in the premises is on a par with the states. Cf., *Shapiro* v. *United States*, 335 U.S. 1, 16; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500.

[29] Act of June 3, 1948, c. 396, 62 Stat. 302; 48 U.S.C. § 77.

[30] Act of June 9, 1926, c. 512, §§ 1, 2, 44 Stat. 710, 711; 48 U.S.C. § 562.

[31] Act of May 17, 1932, c. 190, 47 Stat. 158; 48 U.S.C. § 821. This is still the definition of the legislative authority of the Commonwealth of Puerto Rico organized pursuant to a "compact". Act of July 3, 1950, c. 446, § 1, 64 Stat. 319, 48 U.S.C. § 731 (b).

as we shall discuss, confer full powers, "on a par with" or equivalent to the states, to legislate on the subject of divorce.

4. *The Virgin Islands' Authority to pass the Statute is to be Determined as if it were a State.*

The Amicus reserves judgment as to whether a state would be acting, so to speak, *ultra vires*, if it enacted a divorce law, the purpose of which is, on the Amicus' assumption, to invite people from outside the state to use its courts. (Am. Br., p. 29). We believe that the statutes of Nevada, Florida, Idaho, Arkansas, Utah and Wyoming cannot be attacked as beyond the authority of those states, even though it may be argued that their purpose is in part to invite strangers to come to these states, to remain there for at least the minimum period that the laws prescribe, and possibly to settle there. And since we believe it is to be clear that the power of the Virgin Islands legislature in the premises is the same as that of a state, its statute cannot be held to be *ultra vires*.

Under the 1936 Organic Act, the Virgin Islands were an "insular possession" (48 U.S.C. § 1405a) with an organized government. Under the 1954 revision, although the major structure and the powers of the government are not changed, the islands are referred to as "an unincorporated territory" (Section 2(a), 48 U.S.C. § 1541).[32]

In the case of Puerto Rico which was then an unincorporated territory with a basic structure like that of the Virgin Islands, this Court unequivocally affirmed the comprehensive scope of legislative power conferred by language similar to that in Section 19 of the Virgin Islands Organic Law, and has adverted to its similarity to state power. The following quotations are from *People of Puerto Rico* v. *Shell*, 302 U.S. 253, 261-2:

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[32] The different nomenclature is of symbolic, but not of relevant legal importance. This Court has always, in construing territorial law, observed the substance of the powers granted and the problems involved, rather than the terminology.

"The grant of legislative power in respect of local matters . . . [matters of a legislative character not locally inapplicable] is as broad and comprehensive as language could make it."

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"The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. [citing cases] The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states—as, for example, immunity from suit without their consent. People of Porto Rico v. Rosaly y Castillo, supra."[33]

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"And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures."

Similar characterizations of the scope and nature of territorial power appear in numerous opinions of this and inferior Courts. *People of Porto Rico* v. *Rosaly y Castillo*, 277 U.S. 270, quoting with approval *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 370; *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F. 2d 316, 321 (C.A. 2, 1946); *Cope* v. *Cope*, 137 U.S. 682 (Utah Territory); *W. C. Peacock* v. *Pratt*, 121 Fed. 772 (C.A. 9, 1905) (Hawaii).

5. *The Effect of the Due Process Clause.*

The Amicus claims that Section 9 (a) violates the due process clause of the Organic Act[34] because when that

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[33] The Virgin Islands is immune from suit without its consent. *Harris* v. *Municipality of St. Thomas and St. John*, 212 F. 2d 323 (CA 3, 1954).

[34] "No law shall be enacted in the Virgin Islands which shall deprive any persons of life, liberty or property without due process of law or deny to any person therein equal protection of the laws." 48 U.S.C. § 1406 (g).

"statute was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases throughout the United States." (Am. Br., p. 24). He argues that it must, therefore, be concluded that Congress intended to confine the legislative assembly to the enactment of divorce legislation "within the limits of due process as that term was understood in 1936" (*Ibid*). As we have pointed out, the Amicus does not contend that the elimination of a domicile provision substantively offends the due process clause. His argument is confined to the point that it operates as a *limitation* of the congressional authorization in the 1936 Organic Act.

We pointed out in the "Brief for the Petitioner", pp. 33-35, that domicile was not a fundamental principle of justice when the Fifth Amendment was adopted in 1791, and that this Court has never ruled that it is an indispensable ingredient of due process under the Fourteenth Amendment.

In the first place, as our preceding discussion shows, we are of the opinion that the evidence is overwhelming that the Congress intended to vest the Virgin Islands with power over divorces as complete and as broad in scope as that possessed by the states. Specifically, we again point out the reenactment in 1954 of the relevant provisions of the 1936 Organic Act, including the due process clause and the grant of legislative powers, as indicating the absence of affirmative desire on the part of Congress to avoid or restrict the law here in issue.

In the second place, we believe it to be clear that the due process clause does not freeze legislative power to subjects or types of legislation in vogue at the time of its enactment or adoption. Cf. *Brown* v. *Board of Education*, 347 U.S. 483, 492. We confidently assume that the distinguished Amicus does not mean that the due process clause of the Fifth or Fourteenth Amendments similarly confines the powers of the federal and state governments. His argument must be that the due process clause in the Organic Act was intended by Congress to have a peculiar,

limiting effect which is different from the effect of a constitutional provision.

We see no basis for this argument. The due process clause in the Organic Act was included as part of the familiar, traditional United States bill of rights (48 U.S.C. § 1406g). It had and has no peculiar meaning or exotic significance.

We have found only one case which is in point. In *H. I. Hettinger Co.* v. *Municipality of St. Thomas*, 187 F. 2d 774 (C.A. 3, 1951), plaintiff resisted the imposition of Virgin Islands' local taxes on the ground that it was engaged in performance of a contract for the United States government. The taxes were a sales tax and a tax on persons licensed to do business, measured by gross receipts. Plaintiff claimed that the Organic Act of 1936 did not permit imposition of the taxes upon it, because in 1936, such taxes could not, under decisions of this Court, have been imposed upon it. This Court subsequent to 1936 overruled its prior decision. Plaintiff argued that, in passing the Organic Act, Congress conferred only those powers which could be lawfully exercised at the time the law was enacted, and that subsequent developments could not enlarge those powers.

The Court of Appeals complimented counsel upon the "ingenuity of the argument"; but it held that the tax could be collected against plaintiff.

There is no doubt that the due process clauses of the Organic Act and of the Fifth Amendment are controlling upon the Virgin Islands; but we confidently submit that they do not limit the scope of its legislative power to the enactment of laws of a type that were familiar in 1936.

### C. THE STATUTE DOES NOT CONFLICT WITH THE TENTH AMENDMENT

The Amicus argues that if the statute is within the authorization of Congress, it is invalid under the Tenth Amendment (Am. Br., 29-34). His argument, as we understand it, is again based on the assumption that the statute

is to be construed as "extraterritorial", an assumption discussed above. He, therefore, views the law as an attempted interference with the authority of the States "in the area of marriage and divorce". (Am. Br., p. 30).[35] Accordingly, he concludes that Congress should not merely disapprove of the law "as a matter of comity or discretion", but that the law is invalid because of "the implications of a Federal system, buttressed by the Tenth Amendment."[36]

Again, we point out that the effect of the Virgin Islands law, *ex proprio vigore*, is entirely domestic. If it is to have effect in other jurisdictions, that is because of the authority and action of other jurisdictions under the full faith and credit statute or principles of comity. We deal with these points hereinafter. The Amicus, however, seems to argue that, apart from any question of recognition of the decrees outside of the Virgin Islands, the mere availability of jurisdiction on the basis provided the statute is an interference with state power under the Tenth Amendment.

There is clearly no warrant in law for this position. The Tenth Amendment has nothing to do with the exercise by the Congress of enumerated powers, and particularly of its power under the territories clause of the Constitution (Art. IV, § 3) or otherwise in providing for the territories. We believe that this is settled law.

In a case involving the disposition of property, the Court has held that the Tenth Amendment does not restrict the exercise of congressional power under Article

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[35] We assume that the Amicus does not condemn the marriage laws of the Virgin Islands although they are generous and may be attractive to persons from the states.

[36] Here again, the Amicus does not resolve the question as to whether the legislation of Nevada *et al.* would be invalid, by parity of reasoning, as an unconstitutional interference with other states. See Am. Br. 31.

IV, § 3. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 330. That case exemplifies the rule that the

> "* * * Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" *Case* v. *Bowles*, 327 U.S. 92, 102; *Fernandez* v. *Weiner*, 326 U.S. 340, 362.

Particularly is this true with respect to the power of Congress in dealing with the Territories and Possessions of the United States. Congress in so legislating

> "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 323.

In *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674, this Court stated:

> "In exercising this power [conferred by § 3 of Article IV], Congress is not subject to the same constitutional limitations as when it is legislating for the United States."

The territories, in other words, are subject to the "absolute supervision and control" of Congress, *Talbott* v. *Board of County Commissioners*, 139 U.S. 438, whose power in this area is "full and complete". *First National Bank of Brunswick* v. *Yankton*, 101 U.S. 129. See also *Inter-Island Steam Navigation Co.* v. *Territory of Hawaii*, 305 U.S. 306, 314. Congressional power over the District of Columbia is equally extensive. As this Court recently stated, "it includes all the legislative powers which a state may exercise over its affairs." *Berman* v. *Parker*, 75 S. Ct. 98, 102.[37]

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[37] This Court has repeatedly refused to hold that various constitutional limitations otherwise applicable to Congress are controlling when Congress is legislating for the Territories. So, for example, the requirement imposed by Article III that admiralty and maritime jurisdiction be conferred only upon constitutional

The reliance of the Amicus upon generalizations expressed by James Madison in *The Federalist* in 1788 is misplaced. Madison presented the first ten amendments in their original form to the House of Representatives on June 8, 1789. I *Annals of Congress* 424, 433. He unambiguously indicated his views of the effect of the Tenth Amendment upon the powers of Congress during the congressional debate in 1791 on the bill to incorporate the United States Bank (II *Annals of Congress* 1897):

> "Interference with the power of the States was no constitutional criterion of the power of Congress. As the power was not given, Congress could not exercise it; *if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.*" (emphasis supplied).[38]

Indeed, the Amicus' argument raises an interesting question as to whether he would consider legislation by the Congress under authority of the full faith and credit clause, to compel recognition of divorce decrees, to be invalid. A declaration by Congress that full faith and credit must be accorded in every state to a decree dissolving the marriage where the defendant was personally subject to the jurisdiction of the court or appeared generally (such as

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courts is inapplicable to the Territories. *The American Insurance Co.* v. *Canter*, 1 Peter 511 (1828). The Court has also held that the interdiction in Article I, Section 9 against conferring any preference upon the ports of one state over those of another has no application to the territories. *Territory of Alaska* v. *Troy*, 258 U.S. 101. If the explicit limitations of the judiciary article and the ports-preference clause do not apply in the case of the territories, it would seem clear that the generalized prohibitions in the Tenth Amendment do not inhibit Congress.

[38] The exercise by Congress of its enumerated powers will inevitably have an effect upon state power. Congress could not normally prescribe the price at which state timber can be sold, this Court upheld its authority to do so under the war power. *Case* v. *Bowles*, 327 U.S. 92.

the proposed legislation, discussed in Pet. Br., p. 39) would, of course, affect the states with respect to divorce in the way to which Amicus objects.

We do not, of course, suggest that there are no limitations upon the power of Congress in dealing with the territories, or that there may not be instances where territorial legislation would be invalid as an unjustifiable encroachment upon state authority. But we submit that the Tenth Amendment is irrelevant, and that the standard to be used in the present case is the same as that used to determine the validity and effect of state legislation which is charged with impingement upon the jurisdiction of other states. Judged by this standard, as we elsewhere argue, the Virgin Islands statute is entirely valid, just as the statutes of Nevada and other states are constitutionally unobjectionable.

### D. THE IMPLICATIONS OF AMICUS' POSITION.

If this Court should hold, on the basis of any of the Amicus' arguments, that the statute in issue is beyond the powers of the Virgin Islands or beyond the powers which Congress could exercise or delegate in respect of the Virgin Islands, the consequences would be extremely destructive. The result would be to narrow the extent of territorial home-rule, and to jeopardize a number of important territorial powers and programs.

For example, both the Virgin Islands and Puerto Rico have programs of tax exemption or rebate and subsidies, designed to attract persons and industries in the states to locate businesses in the areas. In Puerto Rico, the program has had spectacular success under the descriptive title "Operation Bootstrap". Sometimes these programs result in the abandonment of factories in the states and their relocation in the islands. Are these programs "extraterritorial", *ultra vires* or unconstitutional as an interference with important interests and policies of the states?

Puerto Rico has a price control program, operative as to certain articles imported from the states as well as others.

The regulation of rice prices, for example, vitally affects a concern of California and other states. If the Amicus is correct, is Puerto Rico exceeding its authority, or is the law unconstitutional for this reason? *Mora* v. *Mejias*, 206 F. 2d 377 (C.A. 1, 1953).

It is unnecessary to multiply examples. The basic fact of the matter is that Amicus' argument would, if accepted, jeopardize or reverse the policy of this nation and critical programs of the various territories and the commonwealth of Puerto Rico.

The policy of this nation, by and large, with respect to its territories is and has been a proud page in history. The broad powers of self-government that we have progressively extended to our dependencies have been a notable and beneficial factor in the current and critical international debate concerning colonialism. For example, the report of the State Department on the Revised Organic Act of the Virgin Islands notes that "Such action by the United States to develop further the self-governing institutions of a territory under its administration serves to support the objectives of American foreign poicy and to strengthen the position of the United States in international affairs."[39]

Although the newly-created Commonwealth of Puerto Rico is still subject, by the terms of compact (Act of July 3, 1950, 64 Stat. 319, 48 U.S.C. § 731 (b)) to the provision that its legislative power "shall extend to all matters of a legislative character not locally inapplicable", the United States Government has advised the United Nations that Puerto Rico has a full measure of self-government, and the United Nations has acted accordingly. (General Assembly Resolution No. 748 (VIII), Cessation of the Transmission of Information Under Article 73 e of the Charter in Respect of Puerto Rico (Nov. 27, 1953)). This, of course, was based upon the assumption, as the official communications show, that the quoted phrase gave Puerto Rico at least the powers of a State of the union.

[39] H. R. Rep. No. 1603, 83d Cong., 2d Sess. 21 (1954).

We regret that the distinguished and justly honored Amicus has arrived at the conclusions which he has stated with respect to territorial power. Our own view, based upon long association with this problem, is that the reasoning which the Amicus strongly urges this Court to accept in order to avoid problems, would be exceedingly destructive to values of fundamental importance.

## VI.

## FULL FAITH AND CREDIT

### 1. THE AMICUS' POSITION.

The brief of the Amicus Curiae argues that if the Court declines to rule that the statute exceeds the authority of the Virgin Islands legislature or of Congress, it should hold that the law is invalid because "it fails to recognize the obligations of the full faith and credit clause."[40] (Am. Br. p. 34, headnote to B). His argument is that the statute assumes, although it is silent on the matter, that Virgin Islands substantive law will be applied to divorce proceedings before its court; and he asserts that the application of Virgin Islands law, rather than the law of the domicile or the state with which the parties are "connected", would be contrary to full faith and credit requirements. He bases this conclusion as to the law to be applied, upon the fact that the statute does not require a longer period of residence than six weeks. Six weeks, he asserts, at least in the absence of "domicile", does not constitute a "reasonable connection" between the parties and the forum. (Am. Br. pp. 34-44). The Amicus acknowledges that "the Full Faith and

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[40] As the Amicus recognizes, the full faith and credit clause of the Constitution does not apply to the territories or the Congress (Art. IV, sec. 1; Am. Br., p. 34). The only full faith and credit requirement applicable to the territories is statutory. 28 U.S.C. § 1738. We make no argument based on this, since we believe that, regardless of interesting possibilities of technical refinements, the territories should be treated as on a par with the states for all purposes relevant to this case.

Credit clause has not been regarded as having application to divorce legislation". (Am. Br. p. 35).

It is first essential to note that the Amicus' full faith and credit point is *not the same, but is the reverse* of that made by the majority below. The majority did not mention the novel proposition that the statute might be invalidated because it did not require the application of the law of some other jurisdiction. They were of the equally novel, but quite different, opinion that the statute was invalid *because the various states would not be required to grant full faith and credit to a decree under its provision.* They felt that in this type of case, a decree not entitled to compulsory recognition abroad was invalid at home, under the due process clause. The majority candidly acknowledged that their reasoning was without the support of precedent.[41] The Amicus agrees with our contention that this point is not involved in the present case. (Am. Br. p. 42).

The Amicus does not discuss the majority's argument, and he does not rely upon the due process clause in this connection. Indeed, we must confess to uncertainty as to the Amicus' position. It appears to be confined to the point that full faith and credit prohibits the Virgin Islands, under this statute, from applying its own law, and that the statute is therefore unconstitutional. Apart from the problem as to choice of law, he does not appear to argue that full faith and credit considerations render the law unconstitutional because it provides for jurisdiction in the alleged absence of a "substantial and real connection" between the Plaintiff and the Virgin Islands. For example, at p. 40, the Amicus states: "The Full Faith and Credit clause does not deprive the State of the forum of jurisdiction to hear the case, but it does require that the State should apply the law which is intimately connected with the contract."

In any event, we shall discuss both propositions: (i) that the failure to provide for application of the law of some other jurisdiction makes the law unconstitutional;

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[41] The majority's argument is discussed in Petitioner's Brief, pp. 28-50.

and (ii) that authorizing jurisdiction in the asserted absence of a requisite "connection" is unconstitutional.

At the outset, however, we wish to recall that in our view, Amicus' argument involves only the second provision of the statute which provides for jurisdiction in the absence of domicile. If domicile is required (as it is under the first provision), presumably, although it is not entirely clear, Amicus would not make either the choice-of-law or the "substantial and real connection" arguments even though the "domicile" statute required only six weeks residence and, unlike the second provision of the present statute, were available *ex parte*. (See Am. Br. bottom of pp. 35 to 36).

**2. PETITIONER'S POSITION.**

Our own analysis of the constitutional problems raised and suggested by the Amicus is aided by regarding them as involving not only full faith and credit considerations, but also due process.[42] In our principal brief, we have adverted to the possibility that due process considerations may not be applicable to this case "because no person is being deprived of any rights". (Pet Br. pp. 27, 28; see Am. Br. p. 24). We are still of the opinion, as we hereinafter note, that this is a serious obstacle.

The Amicus is in accord with our view contrary to the holding below, that the due process clause does not prohibit a legislature from providing for divorce jurisdiction in the absence of domicile (Pet. Br. pp. 28-42; Am. Br. pp. 8, 21, 36, 38, 42). Instead, he seems to suggest that a "reasonable connection" or a "substantial or real connection" should be the test upon which constitutionality depends.[43]

[42] We suggest the relevance of due process with some diffidence, in view of the fact that the Amicus does not make the point. We have the highest regard for the Amicus and the greatest deference to his extensive learning and experience in this field.

[43] This is his contention with respect to the choice of law and the authority of the Virgin Islands to pass the statute. We shall discuss it on the broader, and, we think, more fundamental basis described above.

Our principal point in answer to this suggestion is that even if this standard were imported into our constitutional system, the present statute must be held to be valid. The determination of what constitutes a reasonable or a substantial and real connection is a function of the legislatures of the several states and territories. It is subject to judicial nullification only if it grossly exceeds extremely wide limits of tolerance. See *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U.S. 532.

In the present case, the Virgin Islands legislature has retained unchanged the previously effective period of residence or continuous presence: six weeks. This has been in effect in the largest part of the islands since 1939 and throughout the jurisdiction since 1944. It is the same period that has been required in Nevada since 1931 and Idaho since 1937. It is not materially different from the 60-day period provided for in Arkansas since 1931, and Wyoming since 1935; or the 90-day period provided in Florida since 1935, and in Utah since 1943; or the six months' period provided in North Carolina since 1943.[44]

Moreover, this legislation in the provision dispensing with the need of domicile, requires a type of "substantial and real connection" between the parties and the jurisdiction which is *not* required in conventional domicile jurisdictions and which is of the utmost importance to the real values involved. It not only requires a "connection" between the *plaintiff* and the jurisdiction, but it also requires a "connection" between the forum and the *defendant*. Jurisdiction under this provision is not available *ex parte*. It is available only if the defendant is brought into the proceedings by personal service within the district or by a general appearance. We submit that this provision, which strikes at one of the great evils that beset divorce pro-

[44] N. C. Sess. Laws 1943, p. 493; N. C. Gen. Stats. (1950) § 50-6.

ceedings,[45] is much more important and much more commendable than the spectral, illusive and frequently insincere "connection" between the plaintiff and the forum which is supposedly furnished by domiciliary intent.

We may or may not, as a matter of personal judgment, believe that divorce jurisdiction should be available upon six weeks' residence. We may or may not believe that in our extraordinarily complex federal system and our societey, in which the needs are many and subtle, there is need or justification for this sort of provision. Whatever may be our views as to this complicated problem, it is clear that judgment, within broad limits of tolerance, should be entrusted to the relatively flexible and responsive processes of legislation and not to the strictures of constitutional imperatives.

This does not mean that legislatures may engage in reductions of the required period of residence without any check or control. Apart from the sentiment of their own communities, there is the fact that the Congress may, by legislation under the full faith and credit clause, exert powerful influence on the limits of divorce laws through the medium of prescribing the effect to be given decrees by other states. In the second place, this Court has power effectively to frustrate legislation which so radically departs from prevailing standards as to shock the conscience or to violate basic conceptions of minimum procedural proprieties. And, of course, in the case of the Virgin Islands Congress can apply the residence requirements directly at any time.

The Amicus, however, does not believe that the Virgin Islands statute requires the requisite degree of connection. He believes that six weeks residence is not enough. Two points are to be noted here: (1) The Amicus does not discuss the effect, upon the reasonableness of the connection,

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[45] See *Rice* v. *Rice*, 336 U.S. 674, 678 (Jackson J., dissenting); Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54, 55-58 (1954).

of the requirement that the defendant, as well as the plaintiff, must be subject to general jurisdiction. His failure to comment on this is possibly due to the fact that he believes, we think incorrectly,[46] that the first provision of the statute which would permit *ex parte* proceedings, also dispenses with domicile. (2) The Amicus does not make clear just where he thinks the line should be drawn to separate the permissible from the forbidden. He says (Am. Br. p. 38):

> "If the test is not domicile, then what are its limits? That need not be decided here. It is enough to decide here that a State cannot apply its own law, consistently with the Full Faith and Credit clause, in a divorce case, unless there is a substantial and real connection with the State. Is one year's residence enough? That is not this case. All that needs to be decided here is that six weeks' residence, without domicile, is not enough."

The Amicus' discussion of *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954) illustrates the problems that arise unless the usual rule of according great latitude to legislative determinations is applied here. The Amicus apparently approves of *Crownover* (Am. Br. p. 20). That case involved the New Mexico divorce law which requires residence for one year and domicile as a basis for jurisdiction. The statute contains a *proviso* that persons "who have been *continuously stationed* in any military base or installation in the state of New Mexico for such period of one (1) year, shall for the purpose hereof, *be deemed residents in good faith* . . ." (Italics supplied).

The plaintiff in *Crownover* had been "stationed" at Sandia Base in New Mexico for about 13 months before filing his petition for divorce. He was physically present there for the first seven months, then absent on duty in the Pacific for the next six months, after which he returned to duty at the base five day before filing the complaint (274 P. 2d at 128, 131). The court held that the plaintiff satis-

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[46] See pp. 12-13, *supra*.

fied the statutory requirements and that the law was constitutional.

The Amicus states that in this type of situation, "the connection with the State is real and substantial." (Am. Br. p. 37). We agree that statutes like those involved in *Crownover* and in *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936) (Pet. Br. p. 38), are constitutionally unobjectionable, but we note the following points: (1) The period of actual physical presence in *Crownover* was not "long-continued", but only about six months. (2) There was no claim of domicile or domiciliary intent. (3) Presumably, the plaintiff did not go to New Mexico, as a matter of free will, but was assigned there. In any event, as the court recognized (274 P. 2d at 133), the statute is designed to provide jurisdiction for people who have no intention to stay in the state. Most persons in the armed forces do not choose to go to their base, but are assigned there, and there is no reason whatever to assume that they intend to remain or that they do not retain their domicile in another state. (4) The statute permits *ex parte* petitions. It does not require that both parties shall reside in the jurisdiction.[47]

We respectfully suggest that it would be exceedingly difficult, and of debatable wisdom, to establish a rule of law which would tolerate the statute in *Crownover* and similar situations,[48] and reject the Virgin Islands law. We again emphasize that the Virgin Islands' provision requires a "connection", and in the sense of general jurisdiction, between the defendant and the jurisdiction, as well as preserving the established period of continuous residence required

[47] The defendant appeared generally and contested in *Crownover*. The statement of Amicus that the statue authorizes jurisdiction where "the parties" are stationed at a military base must mean where "one of the parties" is stationed there.

[48] See *David-Zeiseniss* v. *Zeiseniss*, 129 N.Y.S. 2d 649, 205 Misc. 836 (Sup. Ct. 1954), discussed Pet. Br., pp. 38-39, and the English Statutes cited Pet. Br., pp. 36-37.

as to the plaintiff. The constitutional limits of legislative action are not so arbitrary or constrictive as to permit this statute to be forbidden and *Crownover* approved.

**a. In any event, the statutory provision does not violate any constitutional provision.**

In our principal brief, we have set forth our affirmative argument in support of the constitutionality of the second provision of the statute. Addressing ourselves to the points made in the learned opinion below, we argued that the due process clause may not be applicable because no person's rights are infringed. If it is, the legislature has "unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements" (Concurring opinion, per Murphy, J., *Williams* v. *North Carolina (II)*, 325 U. S. 226, 239).[49] We pointed out that the purpose and effect of the statute are extremely limited: that is, in specified circumstances to eliminate the requirement of proof of domiciliary intent;[50] and that the second provision, dispensing with domicile, has the extremely beneficial objective of excluding *ex parte* proceedings from its scope.

We further argued that the question whether a decree under this provision would be entitled to compulsory recognition by the states under full faith and credit was irrelevant because this case involves only jurisdiction to hear the case and no issue of external application.

In any event, we disagreed with the court below that in this type of case "due process at home and full faith and credit in another state are correlative" (207 F. 2d at 676). We submitted that full faith and credit would be accorded

[49] See Pet. Br., pp. 30-32.

[50] The court below remarked that in certain states "the court's finding of domicile is usually contrary to the fact and frequently is based upon evasive or even perjured testimony". 207 F. 2d at 673.

to a decree under the statutory provision, entered after compliance with all of the jurisdictional requirements specified by the statute. We pointed out that under the decisions of this Court it was entirely clear that such a decree could not be collaterally attacked because, under the terms of this provision of the statute, it could not be entered unless the defendant had been served within the district or entered a general appearance.[51]

We believe that these considerations, elaborated in our principal brief, are entirely persuasive of the validity of the statute. As we read the brief of the Amicus we find it difficult to discern his disagreement with them. The Amicus agrees that domicile is not necessary to the constitutionality of a statute providing for divorce jurisdiction. He does not argue that the due process clause renders unconstitutional the specific provisons of the law providing for jurisdiction.[52] He does not make the point that a decree under his statute, assuming that it is otherwise constitutional and valid, would not be entitled to full faith and credit. We assume that the Amicus abandons the reasoning of the majority below in these respects because he does not sponsor its adoption by this Court.

Instead, the Amicus' constitutional objection to the legislation, other than those involved in his *ultra vires* argu-

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[51] In *Cook* v. *Cook*, 342 U. S. 126, both the Court and the dissenting opinion (per Frankfurter, J.) agree, as we read the case, on the following statement by Mr. Justice Frankfurter: "It is inconceivable that the Vermont courts did not know that *the fraudulent claim of domicile by a divorcing spouse is irrelevant to the enforceability in sister States of a decree of divorce if the other spouse contests or consents to the proceeding leading to the decree.*" (Emphasis supplied). (342 U. S. at 131-132). In our principal brief we state our belief that *Williams II* is confined to cases where the defendant had not appeared or been served with process in the state. *Cf. Cook* v. *Cook*, *supra*, at 128.

[52] He argues the relevance of the due process clause of the Organic Act only with respect to the question of the scope of authority of the Virgin Islands legislature, p. 16, fn. 21, *supra*.

ment is that the statutory provision authorizes divorce jurisdiction based solely upon six weeks residence and general jurisdiction of the defendant; that *in such a case*, absent domicile or some additional connection with the forum, the law of some other state would have to be applied; and that this renders the provision unconstitutional.

**b. Full faith and credit considerations do not invalidate the law.**

At two places in his brief, the Amicus acknowledges that his argument that under the instant statutory provision the law of the forum could not be applied, is without precedent or antecedent. (Am. Br. 35, 42)[53]

At page 42, he says: "The problem of the Full Faith and Credit clause [in terms of the choice of substantive law that must be applied, see p. 41] has not been involved in divorce (apart from the question of recognition of divorce decrees, which is not the question here), because the States have proceeded on the basis of domicile."[54] This application of the law of the forum in traditional domicile cases, he says, "is not inevitable, but it has clearly been the law" (Am. Br. p. 42). But where neither domicile nor a substantial or real connection exists, Amicus argues that this should not be the law.

Amicus undoubtedly realizes that whether or not Virgin Islands law or the law of some state should govern the disposition of the Granville-Smith divorce action is not the issue before the Court. The issue is whether the District Court has jurisdiction; not which law should be applied. The District Court dismissed the complaint for want of jurisdiction (R. 13). It did not consider the merits or apply any law to the case.

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[53] At p. 35, Amicus states: "It is true that the Full Faith and Credit clause has not been regarded as having application to divorce legislation."

[54] The bracketed material has been added; the material in parentheses appears in Amicus' brief.

The Amicus, however, considers that his point is relevant apparently on the following reasoning: The statute is silent on the question of the law to be applied to divorce actions brought under its provisions; the legislature must have intended that Virgin Islands law be applied; the application of Virgin Islands law would deny full faith and credit to the laws of other jurisdictions; and the statute is therefore unconstitutional.

We disagree with Amicus' basic proposition that Virgin Islands' substantive law cannot be applied under this statute. We believe that this is the proper law to be applied in all cases brought under the statute[55] because there is a reasonable connection between the Virgin Islands and the parties, and because if jurisdiction to divorce exists (which is to be determined by considerations other than choice of law) it follows that the law of the forum is to be applied. In addition, even if *arguendo* we accept Amicus' theory as to choice of law, Virgin Islands substantive law is the correct law to be applied in many or most cases brought under the statute because it is the only jurisdiction with any connection with the parties, either because they are natives or because the record does not make a case for another jurisdiction. In any event, the Amicus' argument could at most mean that in appropriate cases, some law other than that of the Virgin Islands' would have to be applied. It does not follow that the statute is unconstitutional generally, or as applied to the facts of this case. We shall discuss each of these points.

(1) Amicus' argument as to the choice of law, even if it were valid, does not lead to the conclusion that the statutory provision is unconstitutional. We know of no case in which a statute has been held unconstitutional because, under its provisions, full faith and credit required the ap-

[55] We again recall that, in our opinion and on the analysis of the Court below, only the second provision of the statute is involved in Amicus' argument, since the first provision (the procedural presumption) requires domicile.

plication of the law of another jurisdiction. The cases cited by the Amicus, to the extent that they are relevant (Am. Br. pp. 39-40), merely relate to the choice of law required under certain types of statutes, and not to the constitutionality of the statutes themselves. Even in cases like *Home Insurance Co.* v. *Dick*, 281 U. S. 397, this Court merely ruled, on the facts of that case, that the Texas statute violated due process as applied to the particular contract.[56] Obviously, under the present statute, even if it were true (which we deny), that in some cases, the court would be compelled to apply the law of another jurisdiction, it would not follow that the statute is unconstitutional.

In many, if not most cases arising under the instant provision, the substantive law of the Virgin Islands would have to be applied, even on Amicus' theory. The provision is available to and used by people domiciled in the Virgin Islands and by persons who were married and have lived there. Persons who were born in the Virgin Islands and who have never gone outside of the Islands may, and do, seek divorces under the provision.[57] In such cases the Amicus would undoubtedly agree that Virgin Islands substantive law would apply, even though the parties and the court would proceed under the statutory provision and would not be concerned with evidence as to domicile.

In addition, in the usual case that would arise under the statute, there would be no claim that the law of another

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[56] The Court was careful to note that "The claims here asserted are not based upon the full faith and credit clause." 281 U.S. at 411. The Amicus' use of this case on p. 39 of his brief is not justified.

[57] Cf. *Burch* v. *Burch*, 195 F. 2d 799 (C.A. 3, 1952) and *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), in which the parties were domiciled on the Islands. The clerk of the district court has informed counsel that out of a total of 9 divorce cases filed in January, 1954, (while *Alton* was pending), 3 were filed by persons born in the Virgin Islands and 2 by persons who were married there.

jurisdiction should apply, and no facts upon which to choose such jurisdiction or to base the application of its law. The present record illustrates this type of case.[38] In such a situation, it is clear that the Virgin Islands' law should be applied, even if we accept, *arguendo*, the Amicus' reasoning. We know of no case in which full faith and credit has been held to require the application of foreign law in the absence of a claim asserted by a party and record facts to establish the superior claim of another jurisdiction. Such a doctrine would be as disruptive as it is startling.

(2) Analysis of some problems that would be attendant upon the choice and application of the substantive law of jurisdictions other than that of the forum demonstrates that there is no reason in policy to support Amicus' contention, and that it would be impossible of administration.

We do not emphasize the latter point—the burden that would be placed upon the District Court if it were called upon to determine which law should be applied and what the law is in the various states. The burden would be

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[38] The record shows that Mrs. Granville-Smith became a resident of St. Thomas on February 1, 1953 (R. 8). She filed her petition on March 16, 1953 (R. 1). There is no reason to assume she was "domiciled" elsewhere at that time, although, of course, she may have been. Even Amicus' search of the Manhattan telephone books does not refute the hypothesis, if one chose to advance it, that Mrs. Granville-Smith had no other "home" during the relevant period. The October, 1952, directory does not show a listing for her in New York. (Am. Br. footnote 9, p. 22). She is listed in the October, 1953 directory. The relevant period would be between the 1952 and October 1953 directories. Amicus' research invites the possibility that Mrs. Granville-Smith left "home" in New York or some other place some months prior to taking up residence in St. Thomas and came to New York only after her divorce proceedings were halted by the District Judge's announcement on March 20, 1953 (See Pet. Br. 8). The record does not show this. We do not assert it as fact, but merely as analysis of Amicus' statements in the cited footnote.

impossible and the statute would be nullified. Analysis of the problems is of interest because it vividly demonstrates that there is at least an insistent question as to whether some identifiable jurisdiction other than the forum has a clear, identifiable stake in the divorce of two persons who have submitted their problem to the District Court in the Virgin Islands and one of whom has taken up residence there for at least six weeks. Some of these problems are:

Which is the jurisdiction whose laws would be applied? On what basis would it be selected? Suppose the husband and wife had different domiciles. Would the happenstance of which one was the plaintiff determine the choice of law? If so, how about the policy and law of the defendant's domicile? (*Cf.* Pet Br. p. 41). Suppose the wife or the husband had left the matrimonial domicile, rightly or wrongfully, lived in another state for a substantial period without domiciliary intent, and had then become resident in the Virgin Islands where he or she filed a petition for divorce. Which is the state whose policies are so involved as to require that its substantive law be applied? Suppose in any of these situations or in many others that may be thought of, that there is a difference between the state of domicile and the state of greater connection? Is the law of the state of domicile to govern? How about the "policy" of the other jurisdictions?

Suppose, as sometimes happens, that the wife files a petition and intends to remarry and live in another state. Are the law and policy of that state entitled to consideration, even though she may never have been there and cannot be considered as domiciled there? Or suppose that the plaintiff has no fixed idea as to where he or she will live after divorce? Must a domicile be assigned, and if so, what purpose will be served?

Suppose that the cause of action, upon which the petition is predicated, arose in a state other than that of domicile. Would it be mandatory or permissible to apply that state's law in order to vindicate its policy in respect of people guilty of wrongful conduct within its borders?

Suppose the parties were married in the Virgin Islands,[59] or that the Virgin Islands is the place where the cause of action arose. May it apply its law in such cases? If not, what of its policy interests? If so, what of the policy interests of the domicile or domiciles of the parties, whatever those jurisdictions may be?

We believe that these illustrations will suffice to make the point. The proposal as to choice of law that Amicus would introduce into the jurisprudence of divorce would be impossibly and fantastically vexatious, difficult and complex. But more than this, consideration of the questions that would arise lays bare the illusive quality of the concept of a paramount interest of some jurisdiction, other than the forum, in the dissolution of the bonds of matrimony. We wish to make it clear that we do not reject the social and political thesis that the state in which husband and wife live has a deep concern with their marriage. But we earnestly submit that in our federalized system, in our highly volatile and mobile society, with our established views as to the separate rights of husband and wife, any attempt to translate this thesis into a principle of constitutional law to govern divorces serves no real purpose. On the contrary, it would create havoc.

3. There is no support for Amicus' assertion that Virgin Islands law could not be applied to divorce proceedings under the instant provision. The Amicus recognizes that "No case is known which requires a State to look to the law of any other State in determining whether a divorce should be granted." (Am. Br. p. 35). We submit, first, that a forum with lawful jurisdiction to divorce may apply its own substantive law, whatever its specific jurisdictional requirements may be; and second, if we assume that in addition to lawful jurisdiction, the forum must have a "substantial or real connection" with the subject in order

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[59] In 1952, 237 marriages were celebrated in the Virgin Islands (Op. cit. p. 3, *supra*, at p. 53). See Pet. Br. 38-39; Am. Br. 37, footnote 16.

to apply its own laws, that requirement is fulfilled by the present statute. There is nothing in the statute under consideration which requires or justifies a departure from this rule.

In the first place jurisdiction to divorce means by definition, jurisdiction of the marital status;[60] and jurisdiction of the status means that the law of the forum may be applied.[61]

The cases which Amicus cites at pages 39-40 of his brief are of no utility to the present issue. We agree that "this Court has decided in a large number of cases that States must give full faith and credit to the laws" of other States (Am. Br. 39). We agree that in some of them, but by no means all, this Court has required a state to apply the laws of a sister state because of the latter's intimate connection with the transaction. However, in other cases, other considerations have been determinative.[62] The fact of the matter is that the Court has decided these cases with conspicuous particularity. Decisions have been reached after weighing specifically the type of case; the nature of the issues; the policies of the states; the

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[60] In using this term, we are mindful of its limitations. See *Estin* v. *Estin*, 334 U.S. 541. It is, of course, beyond dispute that jurisdiction of the marital status for divorce purposes may be acquired and exercised if there is appropriate jurisdiction over only one spouse. The bond of matrimony may be severed at either the wife's or the husband's position.

[61] We suggest that the Amicus' contention that *since* the law of the forum cannot be applied, *therefore* jurisdiction does not exist, is an ingenious and unwarranted inversion of this simple proposition.

[62] The law of the state of incorporation has been applied in the fraternal benefit society cases in order to preclude inequality of rights and obligations as between members. *Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 605-606, 610; *see* also *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 504.

relative merits of the claims as to the law to be applied; and the conflicting values involved. In divorce cases, although the question has never been before this Court, it has always been the rule that the laws of the forum will be applied. The Amicus concedes this (Am. Br. p. 35).

Indeed, if any general rule as to choice of law is to be formulated, it is probably that a jurisdiction is "free to determine whether a given matter is to be governed by the law of the forum or some other law." *Klaxon* v. *Stentor Electric Mfg. Co. Inc.*, 313 U.S. 487, 497. This Court will interfere with the decision of the forum only when compelling considerations are present.

We have already indicated some of the difficulties that would arise if we must apply to cases under the Virgin Islands statute the law of other jurisdictions. Indeed, Amicus' suggestion that there should be applied in this field the subtle, involved, and varient conceptions as to choice of law and full faith and credit in other fields would open an entirely new area of constitutional attack, further to plague the law relating to divorces.[63] It by no means follows that, as the Amicus fleetingly implies (Am. Br. 42), that states of "domicile" would be immune from application of the principle. Domicile would establish jurisdiction to divorce, but if it could be shown that another state had a closer connection with the parties, it might well be argued, by analogy with the choice of law cases in other fields, that the law of the latter state must be applied.

Indeed, if something more than jurisdiction to divorce is needed, why does "domicile" supply that something

---

[63] Mr. Justice Jackson, in a stimulating article to which Amicus' quote (Br. 43-44) does not do justice, confessed that he could not "discern any consistent pattern or design into which the cases [in this field] fit." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 16 (1945). Subsequent decisions of this Court are helpful, but the field is still one of great difficulty and complexity.

more? In states like Nevada and Florida, "domicile" adds to the Virgin Islands' requirement only the element of "domiciliary intent." It does not import a substantial and real connection in the sense in which Amicus uses the term. Certainly, it would not be conclusive of the required law that must be applied under full faith and credit if the analogy of cases in other fields is to be applied.

In the second place, even if Amicus' theory is accepted, and it were thought that application of the forum's law requires a substantial connection between the jurisdiction and the parties, that requirement is satisfied by the instant provision. It retains exactly the same period of residence or continuous presence which was provided in the Virgin Islands law and in other jurisdictions for a number of years, p. 34 *supra*. It *adds* to the requirements which previously obtained and to the requirements of states providing for domicile, an insistence upon a connection with the defendant as well as the plaintiff, by providing that he must be personally served within the district or have entered a general appearance in the action. Certainly, there is no reason whatever in these circumstances to indicate any doubt that the rule as to choice of law would be any different in this case than it is in jurisdictions with familiar statutes.

We do not believe that logic either compels or justifies such a differentiation. The consequences of such a conclusion would, of course, destroy the statutory provision and require a reversion to the ritual of domicile.

We do not believe that the effort of the Virgin Islands legislature to escape the Nevada pattern by eliminating the requirement of proof of domiciliary intent deserves this fate, whether it is accomplished by a direct ruling on constitutional grounds or indirectly by challenge to the question of choice of law. On the contrary, we believe that logic and policy indicate that this Court should affirm the right of the Virgin Islands legislature to enact this statute

and confirm the usual and established rule that the law of the forum applies to proceedings for divorce.

We may deplore the policies of states which prescribe short periods of residence as a pre-condition to divorce proceedings, and regret the conditions which bring about such policies. We may wish that there were uniformity among the states or that all legislatures would prescribe a longer period. But under our system of government the prescription of these periods is a matter for the determination by the state and territorial legislatures. It is not subject to the dictation of the courts.

This is the true implication and requirement of our federal system: not, as Amicus suggests, that the federal constitution be used to impose upon our divorce jurisdictions some general policy conceptions; but that each of them should be allowed to pursue its separate policies. Under the Constitution, as Chancellor Kent put it, "The appeal must be made to the mutual comity, moderation, and forebearance of the legislatures of the several states in their respective regulations on the subject of divorce." Kent, *Commentaries on American Law*, 119 (1823).

## CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's Brief, we respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,

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February 1, 1955.

# APPENDIX

## Table I

NUMBER OF DIVORCES BY STATE FOR YEAR 1952[1]

| | |
|---|---|
| UNITED STATES | 2392,000 |
| NEW ENGLAND | 13,818 |
| Maine | 2,207 |
| New Hampshire | 1,119 |
| Vermont | 610 |
| Massachusetts | 6,003 |
| Rhode Island | 1,026 |
| Connecticut | 2,853 |
| MIDDLE ATLANTIC | — |
| New York | — |
| New Jersey | 5,036 |
| Pennsylvania | 11,946 |
| EAST NORTH CENTRAL | — |
| Ohio | 21,854 |
| Indiana | 12,789 |
| Illinois | 24,188 |
| Michigan | 314,925 |
| Wisconsin | — |
| WEST NORTH CENTRAL | 31,784 |
| Minnesota | 4,004 |
| Iowa | 5,596 |
| Missouri | 12,943 |
| North Dakota | 590 |
| South Dakota | 936 |
| Nebraska | 2,403 |
| Kansas | 5,312 |
| SOUTH ATLANTIC | — |
| Delaware | 547 |
| Maryland | 4,934 |
| District of Columbia | 1,186 |
| Virginia | 7,834 |
| West Virginia | — |
| North Carolina | 5,857 |
| South Carolina | — |
| Georgia | 29,000 |
| Florida | 20,468 |
| EAST SOUTH CENTRAL | — |
| Kentucky | — |
| Tennessee | 7,754 |
| Alabama | 9,076 |
| Mississippi | 5,419 |
| WEST SOUTH CENTRAL | — |
| Arkansas | — |
| Louisiana | — |
| Oklahoma | 213,174 |
| Texas | 337,300 |
| MOUNTAIN | 229,563 |
| Montana | 1,989 |
| Idaho | 2,586 |
| Wyoming | 31,250 |
| Colorado | 24,500 |
| New Mexico | 2,940 |
| Arizona | 4,905 |
| Utah | 2,263 |
| Nevada | 9,130 |
| PACIFIC | 57,019 |
| Washington | 9,310 |
| Oregon | 6,311 |
| California | 41,398 |

[1] Source: Summary of Marriage and Divorce statistics, United States, 1952, Vol. 40, No. 3, p. 52 (U. S. Dept. of Health, Edu., and Welf., Nat'l Office of Vital Statistics, Dec. 6, 1954). The figures include reported annulments.

[2] Estimated.

[3] Incomplete.

## Table II*

NUMBER OF DIVORCES IN ALASKA, HAWAII, PUERTO RICO, AND VIRGIN ISLANDS FOR YEAR 1952

| | |
|---|---|
| Alaska | 454 |
| Hawaii | 1,300 |
| Puerto Rico | 14,173 |
| Virgin Islands | 343 |

* Source: Op. cit. Table I, fn. 1, at p. 53.

[1] Excludes annulments.

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IN THE

# Supreme Court of the United States

October Term, 1954

No. 261

Elizabeth R. Granville-Smith, *Petitioner*

v.

Edward Granville-Smith, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONDENT'S STATEMENT

Respondent agrees that the question is novel and important and that it warrants review by this Court.

Respondent appeared in both lower courts and did not raise any objection either to the jurisdiction of the court or to the granting of a decree. Respondent is willing to submit his case for decision on the merits on the basis of the briefs and argument in **Alton** vs **Alton.**

Respectfully submitted,

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August, 1954

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# Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 261.

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*,

*v.*

EDWARD GRANVILLE-SMITH, *Respondent*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF OF AMICUS CURIAE.

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# Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 261.

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*,
*v.*
EDWARD GRANVILLE-SMITH, *Respondent*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF OF AMICUS CURIAE.

On November 22, 1954, this Court entered an order inviting Erwin N. Griswold "to appear and present oral argument as *amicus curiae* in support of the judgment below." This brief is filed pursuant to that invitation.[1]

### OPINIONS BELOW.

The order of the district court appears at R. 13-14. The *per curiam* opinion of the Court of Appeals (R. 15) is

[1] The amicus curiae has received substantial assistance from Marjorie W. Burke and from Frederick S. Wyle, both of the Massachusetts Bar, from Philip A. Putnam, Assistant Librarian, Harvard Law School, and from Erik Siesby, cand. jur. Copenhagen, for which acknowledgment is made here.

reported at 214 F. 2d 820. Both courts below relied on the decision in *Alton* v. *Alton*, which is reported at 121 F. Supp. 878, and 207 F. 2d 667. This Court granted certiorari in the *Alton* case, but later dismissed it as moot. 347 U.S. 610.

## JURISDICTION.

The judgment of the Court of Appeals was entered on July 13, 1954. (R. 16.) The petition for a writ of certiorari was filed on August 5, 1954, and was granted on October 14, 1954. (R. 17.) The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED.

The Legislative Assembly of the Virgin Islands passed a law providing that (*a*) continuous presence of the plaintiff within the district for six weeks immediately preceding the filing of a divorce suit should be "prima facie evidence of domicile," and that (*b*), where the defendant was subject to the jurisdiction of the court, the court should have jurisdiction of a divorce proceeding "without further reference to domicile." It is sought to apply the law to a case where no connection with the Virgin Islands is shown to exist beyond the wife's presence there for six weeks and the husband's authorization to counsel to appear for him in the court.

The questions arising are the following:

1. Is the law beyond the power delegated to the Legislative Assembly of the Virgin Islands, which is limited to the enactment of laws "of local application" and is subject to the restrictions of a due process clause?

2. If the law is one that Congress purported to authorize the Legislative Assembly to enact, is it valid within the Tenth Amendment and the Full Faith and Credit clause?

## STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pp. 46-50.

## STATEMENT.

On February 1, 1953, the petitioner became a resident of the Virgin Islands. (R. 8.) On March 16, 1953—forty-three days later—she filed a petition for a divorce in the District Court of the Virgin Islands. (R. 1.) On the following day, March 17, 1953, the petitioner's husband executed, in New York, a power of attorney authorizing counsel to appear on his behalf and represent him in the divorce proceedings. (R. 7-8.) Two days later the husband's counsel filed an answer (R. 6), and a waiver and consent "to the hearing of this cause as if by default," signed by the husband. (R. 6.) On the following day, March 20, 1953, the wife appeared before a District Court Commissioner and was examined. She gave no proof of domicile beyond her testimony that she had been "a resident and inhabitant" of the Virgin Islands continuously since February 1, 1953. (R. 8-9.) On the same day the Commissioner entered findings of fact and conclusions of law recommending that a divorce be granted.

The proceedings were thereafter held in abeyance pending a decision in *Alton* v. *Alton*. That case was dismissed as moot by this Court on June 1, 1954. 347 U.S. 610. On June 21, 1954, the petitioner's attorneys moved that a decree of divorce be issued pursuant to the Commissioner's

recommendation (R. 11), and on the same day a hearing was held by the court. (R. 12-13.) It does not appear that the petitioner was herself present at the hearing. The court asked counsel for the petitioner whether he had any further evidence to offer on domicile, to which counsel answered: "No, sir." (R. 12.) The court then stated that in his opinion "the proof herein is not sufficient to establish domicile." (R. 12.) Counsel then referred to the legislation of the Legislative Assembly of the Virgin Islands which is discussed in this brief, and the court stated that "I doubt that it is sufficient to confer jurisdiction on this Court to grant this divorce and so rule." (R. 12.)

On the following day an order dismissing the petition for want of jurisdiction was entered. (R. 13-14.) The petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment on the authority of its prior decision in *Alton* v. *Alton*. (R. 15.) The case was then brought here for review.

## SUMMARY OF ARGUMENT.

### I.

This case turns on the validity and effect of certain laws enacted by the Legislative Assembly of the Virgin Islands. The Virgin Islands were acquired by the United States in 1917. They had previously been under Danish sovereignty.

Under the Organic Act of 1936 the Legislative Assembly of the Virgin Islands was established. This consists of the Municipal Council of St. Croix, and the Municipal Council of St. Thomas and St. John, sitting together. In 1944 the Legislative Assembly adopted a divorce law for the Virgin Islands, based largely on earlier provisions enacted by the

two Municipal Councils. By the 1944 law it was provided that a divorce might be granted where the plaintiff was "an inhabitant of the district at the commencement of the action and for six weeks prior thereto."

In 1953 the Legislative Assembly of the Virgin Islands passed the provision which is directly involved here. It provides that, where the plaintiff has been resident for six weeks in the Virgin Islands, "this shall be prima facie evidence of domicile." It further provides that, where the defendant is subject to the jurisdiction of the court, "then the court shall have jurisdiction of the action and of the parties thereto without further reference to domicile."

The power given to the Legislative Assembly of the Virgin Islands is limited by the provisions of section 19 of the Organic Act of 1936. Under this, the legislative power extends "to all subjects *of local application.*" (Italics added.) In addition, Congress expressly enacted for the Virgin Islands the limitations of the due process clauses of the Fifth and Fourteenth Amendments.

It is first argued in this brief that the statute enacted by the Legislative Assembly of the Virgin Islands exceeds the power which has been conferred on that body. It is argued, second, that Congress could not validly authorize the law here involved, because of the limitations of the Tenth Amendment and the general considerations inherent in the Federal system established by the Constitution. Finally it is argued that the statute here involved is invalid because it fails to give full faith and credit to the laws of other States, and is inconsistent with the general assumptions underlying a Federal system.

## II.

The authority of the Legislative Assembly of the Virgin Islands is limited to "subjects *of local application*" (italics added), and by a due process clause. The law in question

is not one "of local application" if it is construed to be applicable in this case. It is therefore *ultra vires*, and invalid.

The Virgin Islands legislation is put in the form of a presumption. However, in its operation it is simply a rule of law. Whether the defendant is before the court or not, the statute, if valid and applied, simply makes domicile immaterial. It authorizes the court to grant a divorce in every case when the plaintiff has shown presence for six weeks, without more. Such a law is not a law for the Virgin Islands. It is not needed for the divorce of Virgin Islanders. When enacted for use by others, it is by that very fact no longer a law "of local application."

That the law is beyond the power granted to the Virgin Islands is also supported by the "due process clause" included by Congress in the Organic Act. This due process clause shows the intention of Congress as to the limited extent of the legislative power it was granting to the Virgin Islands.

The Organic Act should be construed to confine the power of the Legislative Assembly within traditional limits in order to avoid the grave constitutional questions which will have to be considered if this legislation is regarded as authorized by Congress.

---

When this case arose, the Virgin Islands were an "insular possession" of the United States. They are now an "unincorporated territory." In either event, they are a subordinate political entity, with no independent powers; they may exercise no power except that granted by Congress. Territorial legislation has often been held invalid because inconsistent with or not authorized by Congressional legislation. The same rule has long been established

in determining the powers of the various subordinate legislatures of the British Commonwealth. The reasoning behind these rules, developed in the evolution of the British system, seems equally applicable here.

## III.

If the law enacted by the Legislative Assembly of the Virgin Islands is within the purported authorization of Congress, then it is invalid. It invades the powers reserved to the States by the Tenth Amendment, and ignores the implications of a Federal system.

Congress has always been scrupulous to avoid interfering with the States in the area of marriage and divorce. This fact supports the contention that Congress has not authorized such an interference by the Virgin Islands. The restraints imposed on Congress by the Tenth Amendment may well be more restrictive than those imposed on the States (by the implications of the Federal system) to refrain from interfering with each other.

The statute here, if effective, substantially impairs the control of the States over the marital status of persons domiciled within their borders, a matter which was clearly reserved to the States when the Constitution was adopted. A merely colorable connection with the Virgin Islands should not be enough to defeat the power of a State which, under the Constitution and the Tenth Amendment, is sovereign in the field of marriage and divorce. It should not be within the power of the Federal Government, consistently with the Tenth Amendment, and the implications of a Federal system, to provide the means for the evasion of a power clearly reserved to the States by the Constitution. A statute enacted by Congress, or by the authority of Congress, which interferes with the effective powers of the States in such a field is beyond Federal power.

The statute is also invalid under the Full Faith and Credit clause, made applicable to the Virgin Islands by statute. If divorce is to be treated as a transitory action, then the Full Faith and Credit clause requires that the rule of law to be applied should be that of the State with which the parties have substantial connection. No such provision is made in the Virgin Islands statute.

The connection which has traditionally been used in the field of divorce is that of domicile. It may well be appropriate in some situations to proceed in a divorce case on a jurisdictional basis somewhat less than or different from the prevailing conception of domicile. The essence of the rule is that there should be a substantial and real connection with the State.

A Federal system necessarily implies that there will be mutual restraint among the several members of the system. This is reinforced by the Full Faith and Credit clause. A State cannot undertake to proceed in divorce matters, consistently with the Full Faith and Credit clause, without giving full faith and credit to the laws of the State which has a "normal relation to the transaction."

Over the past generation this Court has decided in a large number of cases that States must give full faith and credit to the laws and legislation of other States. These cases all involved questions of contact and relationship. The Virgin Islands statute purports to authorize the court to proceed, not only without domicile, but also without any substantial contact between the forum and the relationship involved. The Virgin Islands statute fails to recognize the law which has proper contact with the situation. It is therefore invalid under the Full Faith and Credit clause, even if it should be held to be otherwise authorized by Congress.

# ARGUMENT.

## I.

## Introduction.

### A.

### The Legislative Background.

This case turns on the validity and effect of certain legislation passed by the Legislative Assembly of the Virgin Islands. In considering that question it may be helpful to have a rather complete statement with respect to the legislation involved. This requires reference both to the law and legislation of the Virgin Islands and to certain Acts of Congress establishing the legislative authority for the Virgin Islands.

#### (1) *The Danish Background.*

The islands which are now the Virgin Islands of the United States were under Danish sovereignty (except for two brief intervals between 1801 and 1815) until they were ceded to the United States in 1917. At the time of their cession the law applicable in these islands was Danish in origin.[2]

Denmark is not a Civil Law country. It did not use nationality as a jurisdictional base. Since at least 1683 the jurisdiction of courts in Denmark has been based on the Code of Christian the Fifth (Christian den Femtes Danske Lov; available in English translation as The Danish Laws: or, The Code of Christian the Fifth, published in London, in 1756). Book I, c. II, sec. 4, of this Code reads as follows:

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[2] This Court administers the law of the Virgin Islands, insofar as the prior Danish law is an element in the present law of the Virgin Islands, or is relevant in forming the background of that law, this Court can, of course, take judicial notice of it. It is not "foreign law" which has to be proved by evidence.

> "All and every one, who do not on Account of a particular Office which they bear, belong to a peculiar Court, are liable to the ordinary Court, where they inhabit or where they reside."

This law is regarded as establishing the "venue" for civil suits, that is, the place where such suits may be brought.

Since a statute of December 1, 1797 ("Forordningen om Tamperettens Afskaffelse"), the rule of jurisdiction in divorce cases has been the same as in other civil cases, namely, that they shall "be brought before the court which is the venue of the defendant." This rule was applied in divorce cases regardless of the fact that the spouses or one of them was a foreigner. Borum, Personalstatuttet (1927) 467; 2 Munch-Petersen, Den Danske Retspleje (1924) 384.

Under the Danish conception more than one establishment or residence could be maintained with a consequent venue at each of them. A person under Danish law had his venue only where he had such a permanent home, and not where he was merely transitorily present. Deuntzer, Den Danske Civilproces (1901) 50-53. A translation of page 52 of this work is as follows:

> "It is generally agreed that Christian the Fifth's Law is to be understood in such a way that the mere residence does not constitute a venue when the defendant has a permanent home whether in this country or not. Consequently persons who have their home abroad cannot be sued according to Danske Lov 1-2-4 during their stay in this country."

Thus it appears that the Danish concept of venue, though differing from our concept of domicile, was very similar to it, and required a connection with the forum much more definite than a mere temporary residence. The

terms "inhabitant" and "residence" as currently used in the Virgin Islands practice (see R. 1 and 8) are apparently directly traceable to Christian the Fifth's Law of 1683 in Denmark. The decision of the Court of Appeals in *Burch* v. *Burch*, 195 F. 2d 799, that these words should now be construed as equivalent to "domicile" is entirely consistent with their meaning in the Danish law, and does not represent any material departure from the rules of divorce jurisdiction or venue which have long been applicable in the Virgin Islands.

Reference is made in *Burch* v. *Burch*, 195 F. 2d 799, 805-806, to the granting of divorces in Denmark on the ground of "incompatibility of temperament" since about 1790. But divorces on that ground were not granted by courts under Danish law, but by an administrative proceeding. In theory, the King was an absolute monarch, and he granted divorces as a matter of prerogative or discretion. In practice, these were handled by a ministry in accordance with rather fixed rules, although the grant of divorce remained a matter of discretion. Borum, Personalstatuttet (1927) 472-482. Moreover, "incompatibility of temperament" alone was at most a ground for a formal separation, rather like a divorce *a mensa et thoro*. After 1790 it became the practice to grant divorces after three years of such separation. II Borum, Familieretten (1946) 65-68.

Divorce has long been available in the Virgin Islands.[3] The older law was considerably less rigid than that applied

[3] Alexander Hamilton's mother was divorced by her husband, John Michael Lavien, in St. Croix, Danish West Indies, in 1759. The grounds stated were desertion and adultery. The husband was a Dane residing at St. Croix. His connection with St. Croix was not casual. See Atherton, "The Hunt for Hamilton's Mother," 175 North Am. Rev. 229 (1902); Atherton, A Few of Hamilton's Letters (1903) xv, xvi; Schachner, Alexander Hamilton (1946) 14-15.

in the British West Indies. But there were definite jurisdictional standards. The defendant must have been a "resident" and an "inhabitant" of the Virgin Islands, and these words meant more than a merely casual connection. This was the law of the Virgin Islands at the time they were acquired by the United States.

(2) *The Virgin Islands Legislation.*

The last Code of Laws for the Virgin Islands prior to the cession to the United States was the Colonial Law, No. 124 of 1906 (printed in English by the Government Printing Office, St. Thomas, in 1924). Under this, the King of Denmark was the basic source of legislative power. Subject to his authority, two "Colonial Councils" were established in the islands. One of these was the Colonial Council of St. Croix. It had five members appointed by the King and thirteen members elected by the people of the St. Croix district. The other was the Colonial Council of St. Thomas and St. John. It had four members appointed by the King and eleven members elected by the people of its area. These bodies had legislative authority for their areas, respectively, subject to approval or disallowance by the King, through his ministers.

When the Virgin Islands were acquired by the United States in 1917 (the treaty of cession is printed in 39 Stat. 1706), Congress passed a brief statute merely continuing the existing legal system subject to the authority of an American governor. By section 2 of the Act of March 3, 1917, c. 171, 39 Stat. 1132, it was provided that the election laws and "the other local laws, in force and effect in said islands" on January 17, 1917, "shall remain in force and effect in said islands," subject to alteration by the Colonial Council having jurisdiction, with the approval of the

President, or under rules and regulations which the President might prescribe.

Under this legislation the Colonial Councils of St. Croix, and of St. Thomas and St. John, continued, with the same names, and with legislative authority over their respective areas. The appointed members were now named by the Governor appointed by the United States—at first a naval officer.

In 1920 and 1921 each of these Colonial Councils passed a Code of Laws. In each of these Codes the district court was authorized to grant divorces, and "incompatibility of temperament" was included as one of the grounds of divorce. In the Code enacted by the Colonial Council of St. Croix it was provided that a divorce might be granted when the plaintiff had been "an inhabitant of the district" for one year. Code of Laws for the Municipality of St. Croix (1920) c. 44, sec. 9. In the Code enacted by the Colonial Council of St. Thomas and St. John it was provided that the plaintiff must have been "an inhabitant of the district" for six months. Code of Laws for the Municipality of St. Thomas and St. John (1921) c. 44, sec. 9. Although verbally drawn from the law of Alaska,[4] the provisions with respect to divorce seem to have been generally consistent with the earlier law in the Islands.

In 1936 Congress passed an Organic Act for the Virgin Islands. In this Act the Colonial Councils were continued, but were now known as Municipal Councils. Each was given "local legislative power" within its area. The Muni-

[4] Chapter 44, sec. 9, of the Codes of Laws of St. Thomas and St. John, and of St. Croix, respectively, are verbatim the same as section 1301 of the Alaska Comp. Laws (1913), except that the time period in Alaska was two years while it was fixed at six months in St. Thomas and St. John and one year in St. Croix. The lawyer who drafted the Virgin Islands Codes had come from Alaska. See Moore, "The Virgin Islands and Its Judicial System," 3 Nat. B.J. 349, 354 (1945).

cipal Council of St. Croix consisted of nine members, all elected by the people. The Municipal Council of St. Thomas and St. John had seven members, all elected by the people. Act of June 22, 1936, c. 699, 49 Stat. 1807, 1808; U.S.C. Title 48, secs. 1405d, 1405e.

By the same Act the Legislative Assembly of the Virgin Islands was established. This consisted simply of the members of the two Municipal Councils sitting in joint session. Act of June 22, 1936, c. 699, 49 Stat. 1807, 1808-1809; U.S.C., Title 48, sec. 1405f. Thus power was given to each Municipal Council to legislate for its area, and to the two Councils sitting together, as the Legislative Assembly, to legislate for the combined areas.[5]

On October 2, 1939, the Municipal Council of St. Thomas and St. John passed an ordinance reducing the period of residence required in divorce actions from six months to six weeks. Ordinance to Amend Sections 8 and 9, Chapter 44, Title III, of the Code of Laws of the Municipality of St. Thomas and St. John.

In 1944 the Legislative Assembly adopted a divorce law for the Virgin Islands as a whole. Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944. This Act followed the general terms and arrangement of the previous divorce laws passed by the two Colonial Councils. It provided that in actions for divorce the plaintiff "must be an inhabitant of the district at the

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[5] References are made to the Organic Act of 1936 since that was in effect when the legislation was passed and the present suit was brought. Since that time Congress has enacted a new Organic Act, Act of July 22, 1954, c. 588, 68 Stat. ; U.S.C., Title 48, secs. 1541 note, 1611-1613. The Revised Organic Act eliminates the Municipal Councils, putting all legislative authority in the "Legislature of the Virgin Islands," consisting of eleven members. It is not believed to make any change in the validity of the legislation here involved or in the status or power of the chief legislative body.

commencement of the action and for six weeks prior thereto."

The Virgin Islands divorce legislation came before the Court of Appeals for the Third Circuit in 1952, in the case of *Burch* v. *Burch*, 195 F. 2d 799. It was there held that the words "residence" and "inhabitant" in the laws of the Virgin Islands meant "domicile" and "domiciliary."

Following the *Burch* decision, the Legislative Assembly of the Virgin Islands, on March 27, 1953, passed a bill which eliminated the words "inhabitant" and "residence" from the divorce law of the Islands, and provided expressly that there should be jurisdiction to grant divorces where the plaintiff had been "physically present" within the district for six weeks prior to the commencement of the action. This bill was vetoed by the Governor on April 22, 1953. (The text of the bill and the veto message of the Governor are set forth in full as Appendices B and C, pages 53-55, of the petitioner's brief in this case.)

Thereafter, on May 19, 1953, the Legislative Assembly of the Virgin Islands enacted a bill adding a new paragraph (a) to section 9 of the Divorce Law. The Governor signed this bill on May 29, 1953. Bill No. 55, 17th Legislative Assembly of the Virgin Islands, 1953. This new paragraph, the validity and effect of which are directly involved in this case, reads as follows:

> "(a) Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the court shall have jurisdiction of the action and of the parties thereto without further ref-

erence to domicile or to the place where the marriage was solemnized or the cause of action arose."

(3) *The Limitations in the Organic Act.*

Before leaving this discussion of the legislative background, a more detailed reference must be made to the Congressional enabling legislation. The power given to the Legislative Assembly of the Virgin Islands is limited by the provisions of section 19 of the Organic Act of the Virgin Islands (Act of June 22, 1936, c. 699, 49 Stat. 1807, 1811; U.S.C., Title 48, sec. 1405r), which reads as follows:

> "The legislative power of the Virgin Islands shall extend to all subjects *of local application* not inconsistent with this Act or the laws of the United States made applicable to said islands . . ." (Italics added.)[6]

It was further provided in section 7 of the Organic Act of 1936 that "The legislative assembly shall have power to enact legislation applicable to the Virgin Islands as a whole . . ."

The Organic Act established the District Court of the Virgin Islands and gave it jurisdiction over a number of subjects, including "All cases of divorce and annulment of marriage." Act of June 22, 1936, c. 699, § 28, 49 Stat. 1807, 1814; U.S.C., Title 48, sec. 1406.

In addition, Congress expressly provided that the legislative bodies in the Virgin Islands should be subject to the limitations of the due process clauses of the Fifth and the

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[6] This same language is continued in the Revised Organic Act of the Virgin Islands, enacted on July 22, 1954. Section 8(a) of this Act provides that "the legislative authority and power of the Virgin Islands shall extend to all subjects *of local application* not inconsistent with this Act . . ." (Italics added.)

Fourteenth Amendments. The Organic Act provided that (Act of June 22, 1936, c. 699, 49 Stat. 1807, 1815; U.S.C., Title 48, sec. 1406g)—

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."

## B.

### Division of the Argument.

The court below held in the *Alton* case that the legislative power of the Virgin Islands with respect to divorce was "*on a par with the States* as to all matters properly included in the grant" (207 F. 2d at 669; italics added). The petitioner's brief quotes only the italicized words, and ignores the qualification, treating the legislation as if it had been passed by a State. It is believed that this is a faulty analysis and that it makes the case appear more difficult than it really is.

This brief will argue, *first*, that the law of the Legislative Assembly of the Virgin Islands here in question exceeds the power conferred on that Assembly by Congress, and is, in the words often used with respect to British colonial and dominion legislation, *ultra vires*. This is an argument which is applicable only to the particular Virgin Islands law relied on here. It requires no direct consideration of the limits of the power of Congress or of the States.

It will be argued, *second*, that Congress could not validly authorize the law here involved because of the limitations placed on the power of Congress by the Tenth Amendment and by the general considerations inherent in the Federal system established by the Constitution. This argument

is one applicable only to Congress. It requires no direct consideration of the validity of similar legislation if enacted by a State.

*Finally*, it will be argued that this legislation is not valid, because it fails to give full faith and credit to the laws of other States, and is inconsistent with the general assumptions underlying a Federal system.

If the Court accepts the first argument, it will not have to consider the second and third; if it accepts the second argument, it will not have to consider the third. It is believed that the first argument is a sound and sufficient basis for the disposition of the case, and that the second and third arguments need not be considered by the Court except as their difficulty and novelty are factors which tend to support the conclusion that the enabling Act of Congress did not authorize the present legislation. On this basis most of the questions discussed at length in the opinions of the court below in *Alton* v. *Alton* and in the brief of the petitioner in this case need not be decided. They are discussed in Point III of this brief in the event that the Court concludes that the legislation here involved was intended to be authorized by Congress.

## II.

### The Law, if Construed to Apply to Persons having No Substantial Connection with the Virgin Islands, is Ultra Vires and Invalid.

There has been much discussion in this case about the law relating to presumptions, including such cases as *Mobile, J. & K.C. R. Co.* v. *Turnipseed*, 219 U.S. 35, and *Tot* v. *United States*, 319 U.S. 463. This learning is important and difficult. If it were necessary to apply it here, it would, it is submitted, support the conclusion reached below. For we have here, in the first part of the statute

(quoted at pp. 15-16, above), a presumption which relieves the person having facts peculiarly within his own knowledge from any responsibility to produce those facts, and puts that burden on the other party, who cannot possibly know as much about the facts relating to the plaintiff as the plaintiff does. Such a presumption is on its face unreasonable.

But it is not necessary to proceed on this ground. Let us look at the Virgin Islands legislation with particular reference to its underpinnings.

### A. The Law is Not One "of Local Application."

The Legislative Assembly of the Virgin Islands has no sovereign powers. Its authority is delegated by Congress and is effective only within the limits set by Congress. As has been pointed out above, Congress has given the Legislative Assembly of the Virgin Islands authority to make laws with respect to "subjects *of local application.*" (Italics added.) Act of June 22, 1936, c. 699, sec. 19, 49 Stat. 1807, 1811; U.S.C., Title 48, sec. 1405r. In addition, its authority is limited by a due process clause which Congress incorporated into its Organic Act. Act of June 22, 1936, c. 699, § 34, 49 Stat. 1807, 1815; U.S.C. Title 48, sec. 1406g.

The law in question will first be examined in the light of the limitations on the Legislative Assembly's authority. Assuming the validity and effectiveness of the statute, there are two possible situations with respect to the defendant, both directly dealt with by the Virgin Islands law:

1. *The defendant may not be served or appear or otherwise be subject to the jurisdiction of the court.* In this event, the first part of section 9(a) is applicable. The plaintiff proves that she has been "within the district" for six weeks, without more. Then the "presumption"

comes into operation, and her proof of presence is "prima facie evidence of domicile." The court is thereupon authorized to grant the divorce. There is no necessity of further proof, and the other party is not before the court.[7]

Where the defendant is not before the court, the language of the statute is that of presumption, but that does not describe its intended purpose and effect. The actual operation and consequence of the statute, if it is applied as written, is that presence for six weeks, without domicile at all, is sufficient basis for jurisdiction for divorce in any case where the defendant is not subject to the jurisdiction of the court. The fact that the statute is phrased in terms of "prima facie evidence" should not obscure the fact that what it does is to provide that the court may proceed when the plaintiff shows six weeks' presence and no more, in cases where the defendant is not before the court. Though lip service is paid to domicile, the statute in fact makes domicile immaterial where the defendant is not before the court.

2. *The defendant may be served within the district, or he may appear, thus becoming subject to the jurisdiction of the court.* In this case, the second clause of section 9(a) of the Virgin Islands law comes into operation. Under this, "the court shall have jurisdiction of the action

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[7] The judge may raise the question, but he can hardly be expected to perform adequately the functions of counsel, such as looking up witnesses. In the district court below the judge raised the question of the validity of the statute. He did not indicate that he would feel obliged to cross-examine the plaintiff if the statute is valid.

The absence of an adversary proceeding in this entire class of cases vitiates the usual premises on which the whole system of presumptions is built. Cf. *United States* v. *Johnson*, 319 U.S. 302. Moreover, the presumption, if effective, would preclude the federal appellate courts from exercising their important function of policing the lower court in this area. Cf. *Hauptman* v. *United States*, 43 F. 2d 86 (C.C.A. 9th, 1930).

and of the parties thereto without further reference to domicile." In such a case, it is submitted, the proper construction of the statute is that domicile is immaterial. The court may proceed simply on the plaintiff's allegation of six weeks' presence. Even if the defendant should seek to contest the issue of domicile he would be barred, since domicile is, under the statute, wholly immaterial.

Thus it appears that the statute is one which, in every case, makes it unnecessary to show domicile. In every case, whether contested or not, whether the defendant is before the court or not, the court is made to have jurisdiction when the plaintiff has proved his presence for six weeks, without more. This is not a presumption in any case. This is a rule of law, a rule of law which says that domicile need *never* be proved in any divorce case, and that a divorce may *always* be granted, as far as jurisdiction to proceed is concerned, when the plaintiff has shown presence for six weeks, without more.[8]

Is such a law one "of local application" in the Virgin Islands? It is submitted that it is not. For bona fide residents of the Virgin Islands, domiciled there, it performs no function and is wholly unnecessary. Virgin Islanders can readily prove their domicile in the Islands. (We are not dealing here with a case of long-continued residence which for some reason did not amount to domicile. It might be that the Virgin Islands Legislative Assembly would have authority to deal with such a case. But that is not this case.) The only persons for whom this statute is useful are persons who are not in fact domiciled in the Virgin

[8] This is the position taken in the petitioner's brief (pp. 12-18) as to the construction of the statute when the defendant is before the court. The legislative history (set out at pages 53-55 of the petitioner's brief) shows clearly enough that the purpose of the legislation was to get around the decision in *Burch* v. *Burch*, 195 F. 2d 799, requiring proof of domicile in proceedings for divorce.

Islands,[9] whose connection with the Virgin Islands is in most cases limited to six weeks, and in all cases is short of domicile. Such a law is not a law for the Virgin Islands. It is an attempt to pass a law for all the world except the Virgin Islands [10]—with particular reference, of course, to the United States.

On its face, therefore, the statute is not one "of local application." No one questions the power of the Legislative Assembly of the Virgin Islands to make a divorce law for Virgin Islanders. This law, however, is not necessary for and is of no use or value for the divorce of Virgin Islanders. When it is applied to others it is by that very fact no longer a law "of local application." If the statute provided that persons proceeding under it should be treated as divorced *within the Virgin Islands* it might be "of local application." Such a decree, however, would have little appeal in the market place, simply because it is obviously only the *external effect* of the decree which is sought when the parties are not domiciled in the Islands. A law which is designed to provide, for practical purposes, *only* an external effect is not, it is submitted, one "of local application."

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[9] Mrs. E. Granville-Smith is listed in the Manhattan telephone directory for October, 1954, at page 658, column 2, with address at 516 East 78th Street. She is also listed, with address at 12 East 64th Street, in the Manhattan telephone directory for October, 1953, page 664, column 4. She is not listed in the Manhattan telephone directory for October, 1952. The amicus curiae has been shown a copy of a letter purporting to come from Mrs. Granville-Smith, dated December 2, 1954, and addressed from 516 East 78th Street, New York 21, N.Y. These facts are mentioned only to show, what is obvious enough anyway, that the legislation, as applied in this case, is not "of local application."

[10] Cf. *Buchanan* v. *Rucker*, 9 East 191, 194 (1808): "Can the island of Tobago pass a law to bind the rights of the whole world?" Should this be done by a majority of a legislative body of sixteen persons in a territory of 26,665 persons (about sixteen-thousandths of 1% of the population of the United States)?

In its application to persons not domiciled in the Virgin Islands (or at least to persons not having a really substantial connection with the Virgin Islands) the statute is not a local law; it exceeds the power granted by Congress, and is *ultra vires*. This seems to be the simple and sufficient ground for disposing of this case.

## B.

### The Law Exceeds the "Due Process" Limitations Imposed by Congress.

This conclusion is also supported by the "due process clause" included by Congress in the Organic Act. Act of June 22, 1936, c. 699, § 34, 49 Stat. 1807, 1815; U.S.C., Title 48, sec. 1406g. It is true, as pointed out by the dissent in the *Alton* case, that no one is here claiming that his "due process" is being violated. But the Virgin Islands statute is generally applicable. The first clause, if valid, could be applied to an absent spouse who knew nothing of the proceedings. The second clause could be applied to a spouse who went to the Virgin Islands for a brief vacation, or, indeed, was merely passing through. It would be hard to sustain the validity of the statute in such applications, and this defect should vitiate the statute generally. Cf. *Wuchter* v. *Pizzuti*, 276 U.S. 13; *Barrows* v. *Jackson*, 346 U.S. 249.

Moreover, the due process clause in the Organic Act has a broader effect than the protection of individuals who do object to the statute's application. It is an expression of the intention of Congress as to the extent of the legislative power it was granting to the Legislative Assembly of the Virgin Islands. Over the past ninety years the due process clause, particularly of the Fourteenth Amendment, has become the basis for working out and delimiting the jur-

isdiction of the States in many situations.[11] Ordinarily this has been in contested cases, where someone was contending that his "due process" was being violated, and this Court spelled out the limits of jurisdiction by deciding that his contention was or was not sound. Thus the due process clause embodies most of the present learning about jurisdictional limits, and it has become a convenient shorthand way of prescribing that jurisdictional limits should be observed.

When Congress laid down a due process clause as a limitation on the legislative power of the Legislative Assembly of the Virgin Islands, it was saying, in effect, that the Legislative Assembly should not have power to legislate except within the then traditional areas of jurisdiction. When this statute was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases throughout the United States.

This "due process" clause in the Organic Act thus becomes a further limitation on the legislative power of the Virgin Islands, not because any person claims that he has been deprived of anything without due process of law, nor because any State makes such a claim, but because Congress has laid down this basic standard of jurisdiction in authorizing the Legislative Assembly to legislate at all. There may be room for experiment as to jurisdiction by the several states. But Congress has not authorized the Virgin Islands to carry out such experiments; on the contrary, Congress has expressly legislated that the enactments of the Virgin Islands shall be on "subjects of local application," and within the limits of due process as that term was understood in 1936. Cf. *Bloomer* v. *Todd*, 3 Wash. Terr. 599 (1888).

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[11] See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714; *Milliken* v. *Meyer*, 311 U.S. 457; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, among many others.

## C.

### The Organic Act should be Construed to Limit the Power of the Virgin Islands Legislature so as to Avoid Grave Constitutional Questions.

Finally, if there should be any doubt about the construction of the applicable Acts of Congress involved here, that doubt should be resolved in favor of the construction here advocated. For a broader construction would raise grave and difficult constitutional questions which should not be faced by this Court unless and until Congress makes it plain that it intends to authorize legislation such as that involved here. Cf. *Helvering* v. *Griffiths*, 318 U.S. 371.

These constitutional questions are discussed in Point III of this brief. They are novel and difficult constitutional questions. When and if they are directly raised they will have to be resolved by this Court. But they are large questions of fundamental importance in a Federal system, and should not be decided prematurely. There is no need to decide them now if it is concluded that the legislation involved here exceeded the authority granted by Congress. That is itself a reason for construing the Acts of Congress not to give such authority.

## D.

### Authorities on Analogous Questions Support the Construction Here Advanced.

The argument thus far has been based largely on the face of the statute as applied to the facts of this case. Reference may now be made to decisions in support of this conclusion.

At the time the Virgin Islands legislation was passed and this case arose, the Virgin Islands were an "insular possession" of the United States under the Organic Act

of 1936. Under the Organic Act of 1954 the Virgin Islands are an "unincorporated territory" of the United States. It is obvious that this is a subordinate political entity, entirely subject to the authority of the Congress of the United States (under its constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"; Art. IV, sec. 3, cl. 2). As this Court said in *Talbott* v. *Silver Bow County*, 139 U.S. 438, 446, a territory "has no independent powers. It is a political community, organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization." See also *National Bank* v. *County of Yankton*, 101 U.S. 129, 133.

Territorial legislation has often been held invalid because inconsistent with or not authorized by the Congressional legislation. An early case is *Ferris* v. *Higley*, 20 Wall. 375. See also *Clayton* v. *Utah Territory*, 132 U.S. 632. A case which is relevant though now somewhat quaint is *Bloomer* v. *Todd*, 3 Wash. Terr. 599 (1888). It there appeared that Congress had authorized the legislature of Washington Territory to make provision for "citizens" to vote at future elections. The legislature passed a law providing that women might vote. The court held this invalid on the ground that Congress could not have contemplated that the words it used would authorize women to vote. The result was changed some time ago, but the rule of the case that territorial legislation cannot go beyond the authorization of Congress is still valid, and is applicable here.

See also *Territory* v. *Lee*, 2 Mont. 124 (1874), where the Territory of Montana passed a law forfeiting all mines

held by aliens. This was held invalid on the ground, *inter alia*, that it was not within the power of "local legislation." 2 Mont. at 143.

The same rule has long been established in determining the powers of the various subordinate legislatures in the British Commonwealth. When such legislation goes beyond the powers delegated it is said to be *ultra vires*. Many legislative enactments have been held invalid on this ground. It is not necessary to catalogue them in detail here. Reference may be made to *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*, [1949] A.C. 110; *Attorney-General for Canada* v. *Attorney-General for Quebec*, [1947] A.C. 33, and *In re the Insurance Act of Canada*, [1932] A.C. 41. In these cases various tests have been formulated: Acts are to be judged according to their "pith and substance" (*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, 587), according to their "true nature and character" (*Russell* v. *The Queen*, 7 App. Cas. 829, 839-840 (1881)), according to their "effect" and "purpose" or "object" (*Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A.C. 117, 130-131). See Mundell, "Tests for Validity of Legislation under the British North America Act," 32 Can. Bar Rev. 813 (1954). It seems clear enough that the "pith and substance," the "true nature and character," the "effect," the "purpose," the "object," of the Virgin Islands legislation involved in this case is external, not internal; that it is designed for non-residents of the Virgin Islands, and is not "of local application."

Some of the British cases have involved questions of the territorial application of legislation. Perhaps the leading case is *MacLeod* v. *Attorney General for New South Wales*, [1891] A.C. 455. That case involved a statute of New South Wales which defined bigamy as a second marriage while the first spouse was still living, "wheresoever such

second marriage takes place." It was sought to apply the statute to a man who married his first wife in New South Wales and then married again in St. Louis, Missouri. The court held that, despite the terms of the statute, it must be construed to apply only in cases where the second marriage occurred in New South Wales. Otherwise, it would be *ultra vires* for the New South Wales legislature, which has no extraterritorial powers.

Similar results have been reached in other cases, involving taxes on transactions outside the territorial limits of the legislature which sought to apply its laws. See *Commissioners of Stamps (Queensland)* v. *Wienholt*, 20 Commonwealth L.R. 531 (1915); *London and South American Investment Trust, Ltd.* v. *British Tobacco Co. (Aus.) Ltd.*, [1927] Ch. 107; *Spiller* v. *Turner*, [1897] 1 Ch. 911; *Brassard* v. *Smith*, [1925] A.C. 371.

The rule that various legislatures in the British dominions could not pass legislation with extra-territorial effect was so well established that it was deemed desirable to abrogate it in part as one of the provisions of the Statute of Westminster, enacted in 1931, 22 Geo. V, c. 4. Section 3 of this statute provides: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial application." By its terms, this did not apply to colonies or to the provinces of Canada and the states of Australia. Thus these legislative bodies still remain subject to the rule that they cannot pass extraterritorial legislation. See Wheare, The Statute of Westminster and Dominion Status (5th ed. 1953) 85-86, 134-135, 193-194, 211-212, 224.

The reasoning behind these rules, developed in the evolution of the British system, seems equally applicable here. The Virgin Islands has no trace of sovereignty. It exercises a delegated and limited legislative power. Its authority is to make laws "of local application." What it

has done here is to make a law whose intended and obvious impact is on persons who have no substantial connection with the Virgin Islands.[12] Such a law is, in "pith and substance," one of extraterritorial effect, and is *ultra vires*. Its "object" and "purpose" is extraterritorial, and not internal to the Virgin Islands. It is, therefore, beyond the powers conferred on the Virgin Islands legislature. Whether such a statute could be enacted by a state having sovereignty in this area is another matter.

## III.

**If the Law Enacted by the Legislative Assembly of the Virgin Islands is within the Purported Authorization of Congress, then it is Invalid under either the Tenth Amendment to the Constitution or the Full Faith and Credit Clause.**

### A.

### The Law, If Federally Authorized, Invades the Reserved Powers of the States.

The framers of the Constitution thought that the absence of power in the Federal Government on matters not granted to that government was clear enough on the face of the Constitution. But, to allay fears, and to remove all doubts, this was made explicit by the Tenth Amendment, adopted in 1791, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[12] *Cf.* Moore, "The Virgin Islands and Its Judicial System," 3 National Bar J. 349, 359 (1945): "Recently the Legislative Assembly of the Virgin Islands made a bid for American tourists by enacting a law requiring only six weeks' residence for divorce."

It is of course clear that control over matters of marriage and divorce was retained by the States when the Constitution was adopted. There is no federal power with respect to marriage and divorce within the States. This is established by a long list of cases. *Barber* v. *Barber*, 21 How. 582; *In re Burrus*, 136 U.S. 586; *De la Rama* v. *De la Rama*, 201 U.S. 303, 307; *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379. In the *Burrus* case this Court said (pp. 593-594) that "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."

Congress does have power to deal with marriage and divorce in the District of Columbia and the Territories. But this is not a power which should or can be exercised in such a way as to make ineffective the powers of the States with respect to marriage and divorce. Cf. *United States* v. *Dewitt*, 9 Wall. 41. This follows from the inherent implications of a federal system. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316. Nothing in our system of shared powers seems more properly to be allocated to State control than the regulation of marriage and divorce, parent and child, and other aspects of the family relationship.

Congress, as the central legislature in a Federal system, should take great pains to see that its laws, or those enacted by its authority, do not encroach on the legitimate spheres of the States. Indeed, it may be said with confidence that Congress has always been scrupulous to avoid interfering with the States in the area of marriage and divorce. The fact that no case involving such an attempted interference has previously arisen is eloquent evidence of that fact. It also goes far to show that, as argued above, Congress has not in fact authorized such an interference by the Virgin Islands.

But this is not just a matter of comity or discretion on the part of Congress. This result is also directly required

by the implications of a Federal system, buttressed by the Tenth Amendment. These require Congress to refrain from action which will impair the powers of the States over matters which the Constitution reserved to them. The restraint on Congress imposed by the Tenth Amendment may well be more restrictive than that imposed on the States (by the implications of the Federal system) to refrain from interfering with each other. We are dealing here with legislation made under Federal aegis. The power of the Virgin Islands with respect to marriage and divorce should be limited to proper subjects for Federal action.

The law involved in this case has the intended effect, if it is valid, of enabling one party to a marriage to get a divorce if he has been present in the Virgin Islands for six weeks, without either party being domiciled there. If such a law is valid, would not a mail order law be equally valid, without any residence at all?[13] What is the magic in six weeks? Indeed, the six weeks' residence requirement is designed to produce tourist business, and bears no relation to any substantial or permanent connection with the Virgin Islands.[14] The only real distinction between this

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[13] This question is no more striking than it is realistic. *Cf.* Cardozo, "Divorce without Domicile," 39 Corn. L. Rev. 301, 302 (1954): "If a state is to be permitted to grant divorces without bona fide domicile, however, they can grant them on five weeks' residence, three weeks, one week, one hour—why not by mail without any physical presence, as with other transitory actions? This would destroy all control of a state over the marital affairs of its citizens. Maybe it would be socially desirable, but is it for the courts to make the decision that it is permissible, when for so long they have said that it is not?"

[14] On February 1, 1954, the St. Croix Chamber of Commerce Newsletter stated that "change in the divorce situation" was one of the reasons for "the lack of tourist business during the present season." See Virgin Islands Report (Report of Mr. Butler of Nebraska relative to Investigation and Hearings in the Virgin

statute and a mail order statute, with both parties consenting to the jurisdiction by entering appearances, is that the present statute can be used only by those citizens of States who have the time and the means to go (or have their spouses go) to the Virgin Islands for six weeks, while a mail order statute would be available to anyone who had the cost of postage and a modest counsel fee.

Is it not obvious that such a statute as this substantially impairs the control of the States over the marital status of persons domiciled within their borders, a matter which was clearly reserved to the States when the Constitution was adopted? Cf. *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U.S. 315 (Cardozo, J.). It may be desirable to have divorce by mutual consent in this country, or by agreement, after a six weeks' waiting period. It may not be desirable to have divorce on such a basis. But is that not an issue which the States should be free (and by "free" is meant really and genuinely and effectively free) to decide for themselves? If people do not like the divorce laws of their State, as decided by the people of their State, they are surely free to move elsewhere. But can it be said that they are entitled to keep their homes in a State, being thereby citizens of that State,[15] and ignore the divorce laws of

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Islands), 83d Congress, 2d Sess., Committee Print (1954) p. 4. See also the interesting statement by Judge Herman E. Moore at pages 54-55 of the same report.

[15] The Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and *of the State wherein they reside*." (Italics added.) It is obvious that "reside" as here used means something more than a casual and transitory presence. Mr. Justice Jackson has observed that it "perhaps is required by the implications of the Fourteenth Amendment" that persons "have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed." Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 29 (1945).

the State? Is a merely colorable connection with the Virgin Islands enough to defeat the power of a State which, under the Constitution and the Tenth Amendment, is sovereign in the field of marriage and divorce?

At any rate, it surely is not within the power of the Federal Government, consistently with the Tenth Amendment and the implications of a Federal system, to provide the means for the evasion of a power clearly reserved to the States by the Constitution. Suppose, for example, that Congress were to pass a law providing that a register should be established at the corner of Pennsylvania Avenue and 14th Street, in the District of Columbia, in which any persons domiciled in any State might register and they would thereupon be divorced. Could it be supposed that such a statute would be valid and effective within the Tenth Amendment and the implications of the Federal system? Would this not clearly invade the reserved powers of the States? If not, then the reserved powers of the States with respect to divorce have no reality, and that surely was not the view of the founding fathers. Would such a Congressional statute be any better if it provided for a residence in the District of Columbia, without domicile, for a day, for a week, for six weeks? The impairment of State power would not be materially different in any of these cases. Yet the latter case is precisely the one raised by the Virgin Islands statute involved here, if it can be regarded as having been passed by Congressional authority.

In No. XLV of The Federalist, Madison dealt with the relations of the Federal Government to the States. He wrote: "Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments." And later in the same essay he added: "The

powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

It is true that there are no cases holding that Congress cannot pass such a statute. Congress never has passed such a statute, or anything like it. On the contrary, Congress has consistently refrained from interfering with the States with respect to a matter so clearly within their reserved powers. This long-continued restraint thus becomes a further ground in support of the proposition that Congress has not authorized what has been attempted here.

The Virgin Islands statute involved in this case is an attempted exercise of delegated Federal power. If it is effective, it will provide matrimonial release for some couples who cannot obtain it, or cannot obtain it so easily, in their home States. But if they cannot get what they want, or as they want it, at home, it is because the laws of their own States so provide. That, under our Federal system, made explicit by the Tenth Amendment, is for those States to decide. A statute enacted by Congress, or by the authority of Congress, which interferes with the effective power of the States on this matter is beyond Federal power.

## B.

### The Law, if Authorized, is Invalid since it Fails to Recognize the Obligations of the Full Faith and Credit Clause.

The Full Faith and Credit clause of the Constitution (Art. IV, sec. 1) is, by its terms, applicable only to the States. But Congress has enacted a statute making the full faith and credit rule applicable to the territories. Originally, Act of March 27, 1804, c. 56, sec. 2, 2 Stat. 298,

299; now found in U.S.C., Title 28, sec. 1738. The relevant portion of this provision reads as follows:

> "The Acts of the legislature of any State, Territory or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

As applied to this case, full faith and credit is a statutory rule. It is in terms addressed to the court rather than to the legislature, but it directly affects the validity of the legislation here in question. It was clearly the implicit assumption of the Virgin Islands legislation that the court which proceeded under it would decide the case by Virgin Islands law. Thus the legislation cannot be applied in the court consistently with the full faith and credit command.

It is true that the Full Faith and Credit clause has not been regarded as having application to divorce legislation. For many years the States (and the Federal Government in the District of Columbia and the Territories) have granted divorces based on their own laws as to the grounds and the conditions necessary to obtain a divorce. No case is known which requires a State to look to the law of any other State in determining whether a divorce should be granted.

But this has been the rule, it is submitted, only because of the universal assumption that a divorce could not be granted unless at least one of the parties was domiciled within the State, or, in a very few cases, had a close, continuing, and substantial connection with the State. If there is domicile in the State, then there is a close relation with the State and it is appropriate for the State to apply its

own law. If the party is domiciled in the State, then he is a part of that State, one of its inhabitants, a member of its body politic. The State of domicile has a proper interest in his marital status, and ordinarily no other State has so strong an interest. It is hardly surprising, therefore, that the rule has grown up almost as a matter of course that the forum applies its own law in divorce cases, and that it does not deny full faith and credit to the laws of any other State in doing so. It applies its own law because the marital status of its citizens is its genuine and legitimate concern. It is not a mere vehicle for granting surcease to strangers to its polity.

But all of this has clearly been based on the premise of domicile in the forum, or at least some substantial and abiding relation between a party and the forum. This was plainly recognized in *Williams* v. *North Carolina* (II), 325 U.S. 226, 229, where this Court said: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." See also *Jennings* v. *Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948). From the time that standards in this area crystallized more than a hundred years ago, very few cases are known which did not proceed on the basis of domicile, and in those there was a real and substantial relation between one or both parties and the forum.

Domicile is, no doubt, a refined concept. What legal concept is not? It may be appropriate in some situations to proceed on a basis somewhat less than or different from the prevailing conception of domicile. The essence of the rule is that there should be a substantial and real connection with the State whose forum is invoked for a divorce. Of course, domicile is not perfect wisdom; it is not inevitable or inherent. But it is a convenient and sensible way of determining the connection between a person and a State—

which has long been accepted and used for that purpose. It represents a large amount of experience with a problem having wider aspects than the interests of the parties alone.

Some variations from the domicile rule can be readily accepted, while maintaining the necessary element of a substantial and real connection with the State. For example, the English statute, referred to at page 37 of the petitioner's brief, allowing a divorce to a deserted wife after three years' residence even though, under the English rule, she is not domiciled in the forum, seems obviously valid and acceptable, since the wife in such a case has a substantial connection and identification with the forum. Similarly, there should be little difficulty with the situation involved in *Crownover* v. *Crownover*, 274 P. 2d 127 (N.M. 1954), where a divorce was granted under a State statute authorizing such action where the parties are stationed at a military post within the State, and have resided for one year within the State. There the connection with the State is real and substantial. In many cases it is more real and substantial than is the connection of the parties with any other State.

In both of these situations there is long-continued presence in the State, plus an intent to reside therein. Both of these elements are strangers to this case. In both of these situations there are, too, special and artificial circumstances relating to the rules of domicile which are likewise absent here. These decisions are consistent with the essence of the rule of domicile. They are in no sense authorities for rejecting domicile in situations where special circumstances are wholly lacking.[16]

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[16] Even in the odd case of *David-Zieseniss* v. *Zieseniss*, 205 Misc. 836, 129 N.Y.S. 2d 649 (Sup. Ct. 1954), the marriage occurred within the State, which is more than can be said here. See the comment on that case in 68 Harv. L. Rev. 543 (1955). *Gould* v. *Gould*, 235 N.Y. 14, 138 N.E. 490 (1923), involved no question of

If the test is not domicile, then what are its limits? That need not be decided here. It is enough to decide here that a State cannot apply its own law, consistently with the Full Faith and Credit clause, in a divorce case, unless there is a substantial and real connection with the State. Is one year's residence enough? That is not this case. All that needs to be decided here is that six weeks' residence, without domicile, is not enough. That, indeed, has already been decided by this Court, under the Full Faith and Credit clause, in *Williams* v. *North Carolina* (II), 325 U.S. 226.

A Federal system necessarily implies that there will be mutual restraint among the several members of the system. This implication is reinforced by the Full Faith and Credit clause. The rule which is believed to be applicable has been well formulated by this Court in a case involving a question which is analytically closely related to the one involved here. In *Seaman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 408, this Court said:

> "The effect of the qualification [upon the right of the parties to stipulate the law governing the contract] is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has *no normal relation to the transaction and to whose law they would not otherwise be subject.*" (Italics added.)

It may be that it will sometime be established that neither domicile nor any connection with the State at all, beyond appearance in its courts, is an essential basis for entertaining a suit for divorce. Divorce would then be-

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the interrelations of a Federal system. Moreover, the parties there had resided in France for over five years when the divorce suit was brought, and the divorce was granted on a ground recognized in New York.

come a transitory action. (Would that mean that a deserted wife could *only* get a divorce where she could serve the defendant, as in other transitory actions?) If such a wholly novel step is to be attempted, it would seem that it should be done by a State and not by a possession or territory exercising delegated legislative authority. If such a step has been taken by the Virgin Islands in this case, it is submitted that the legislation is invalid because it denies full faith and credit to the divorce laws of the States. If the Virgin Islands undertakes to proceed without domicile, and without any further requirement than six weeks' presence, then it is a place which has "no normal relation to the transaction," and is one "to whose law" the parties "would not otherwise be subject." In such a case, even if the Virgin Islands court has "jurisdiction" over the parties, that jurisdiction cannot be exercised, it is submitted, consistently with the Full Faith and Credit clause without giving full faith and credit to the laws of the State which does have "normal relation to the transaction," and is the one to which the parties' marital relation would "otherwise be subject."

Over the past generation this Court has decided in a large number of cases that States must give full faith and credit to the laws and legislation of other States. These cases fall into several groups. It is not necessary to discuss them in detail here. It is sufficient to indicate the types of cases which have required reference to the law of another State.

1. The earliest of these cases involved insurance contracts. These cases include *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Home Insurance Co.* v. *Dick*, 281 U.S. 397; *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143. These cases hold that a State may not properly apply its law to a contract which was made in another

State, thus becoming subject to the law of that State. The Full Faith and Credit clause does not deprive the State of the forum of jurisdiction to hear the case, but it does require that the State should apply the law which is intimately connected with the contract. In the *Hartford Accident and Indemnity* case this Court, in refusing to allow the forum to apply its own law, referred (292 U.S. at 150) to the fact that "the forum has but slight connection with the substance" of the action.[17]

2. Another group of cases involves fraternal benefit societies. These cases include *Royal Arcanum* v. *Green*, 237 U.S. 531; *Modern Woodmen of America* v. *Mixer*, 267 U.S. 544; *Sovereign Camp* v. *Bolin*, 305 U.S. 66; *United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586.

3. A somewhat related group of cases involves relations between a stockholder and his corporation: *Hancock National Bank* v. *Farnum*, 176 U.S. 640; *Converse* v. *Hamilton*, 224 U.S. 243; *Selig* v. *Hamilton*, 234 U.S. 652; *Marin* v. *Augedahl*, 247 U.S. 142; *Broderick* v. *Rosner*, 294 U.S. 629. See also *Pink* v. *A.A.A. Highway Express, Inc.*, 314 U.S. 201.

4. A final group of cases involves workmen's compensation. These cases include *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145; *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U.S. 532; *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493.[18]

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[17] Cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345, where, in passing on jurisdiction to impose a tax, this Court said: "But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires *some definite link, some minimum connection*, between a state and the person, property or transaction it seeks to tax." (Italics added.)

[18] See also *Hughes* v. *Fetter*, 341 U.S. 609, and *First Nat. Bank* v. *United Air Lines, Inc.*, 342 U.S. 396, involving full faith and credit to wrongful death statutes.

All of these cases involve questions of contact and of relationship. In the insurance cases the law of the State of contracting must be applied because that is the law that is most intimately connected with the contract. In the fraternal benefit and corporation cases there is a relationship, and the law which must be recognized and applied is the law having the most intimate connection with that relationship. In the fraternal benefit and corporation cases this is a single law, the law of the State of incorporation. As the workmen's compensation cases show, more than one State may apply its law to an industrial accident. But in each case it is a State having a real and substantial connection with the transaction, and not a mere casual or colorable contact.

These cases are full of statements referring to the closeness of the connection between the parties or the transaction with the State whose law must be applied. For example, in *Modern Woodmen of America* v. *Mixer*, 267 U.S. 544, 551, Mr. Justice Holmes said: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation." In *Broderick* v. *Rosner*, 294 U.S. 629, 645, Mr. Justice Brandeis said: "Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other states." In *United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586, 606, Mr. Justice Burton said: "The fact of membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship . . . Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio."

The problem of the Full Faith and Credit clause has not been involved in divorce (apart from the question of recognition of divorce decrees, which is not the question here), because the States have proceeded on the basis of domicile. When the parties, or at least one of them, are domiciled in the State of the forum, then the forum has a sufficient contact with the situation to make it appropriate to apply its own laws. This is not inevitable, but it has clearly been the law. It may be that a State is free to proceed in divorce matters without domicile if it chooses to do so. Where it undertakes to proceed on the basis of six weeks' presence, without more, however, its contact with the situation, with the relationship, is tenuous, to say the least, and, by hypothesis, less close than is that of some other State, ordinarily the State of the domicile. If the State undertakes to proceed in such a case, the underlying implications of the Federal system, and the Full Faith and Credit clause, require that it give effect to and apply the laws of the State which is in fact intimately connected with the situation.[19] Any other rule will deprive the States of control over the marital status of persons domiciled within their borders. Any other rule will be inconsistent with the fundamental assumptions of a Federal system, and with the Full Faith and Credit clause, which was expressly provided as one of the means of maintaining this Federal system.

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A great Federal Government is a complex concept and involves a highly articulated structure. This is necessary to provide ample scope for the central government and its powers and proper protection for the States in the exercise of their powers. Many elements—basic conceptions. Full

[19] This point was recognized in the dissenting opinion in *Alton* v. *Alton* 207 F. 2d 667, at the close, pp. 684-685.

Faith and Credit, Due Process, and the Tenth Amendment —are all present to insure that no member of the system shall unduly entrench on another. These are not empty words or concepts. They perform a fundamental function. That, in last analysis, their content is maintained and protected by this Court merely emphasizes the fact that their vitality and effectiveness are of the essence of our Federal plan.

No better statement of factors involved in these questions is known than that made by Mr. Justice Jackson in his address on "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 27-30 (1945). The argument on this point may well conclude with extracts from this prescient summary:

> "Always to be kept in mind in dealing with these problems is that the policy ultimately to be served in application of the [full faith and credit] clause is the federal policy of 'a more perfect union' of our legal systems. No local interest and no balance of local interests can rise above this consideration. . . .
>
> "The distinction between federal interest and local interest may be elusive but always it is present in these conflicts. Fundamental to every such conflict of law is that separate states consider their own interests to require inconsistent social or economic policies. . . . Conflicts which we face day after day are less deep and less bitter [than that involved in the Dred Scott case], but none the less they grow out of disagreement between states as to the policies that will promote their social welfare. One state thinks its need is to encourage individual capital to come and exploit its latest resources and therefore is niggardly about putting the burden of industrial accidents upon industry. Another, more fully industrialized perhaps,

adopts a policy of more generous workmen's compensation. Or religious convictions prevailing in one state lead to a highly restrictive policy of divorce, while another grants it on easy terms. . . .

". . . But, even if we could appraise or compare relative local interests, we must lift these questions above the control of local interest and must govern conflict in these cases by the wider considerations arising out of the federal order. . . . The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system. . . .

"Even where each conflicting policy claims recognition on the same ground and the conflict proceeds from contrary findings of fact, there would seem to be a federal interest, distinct from that of either state, in its solution. Domicile is the ground which furnishes the best example. . . . The real issue is not whether the court of either state must conform its decision to that of the other, but whether both must not conform their decisions in this field to some federal constitutional standard.

". . . the federal interest is concerned that a Mr. Williams and a Mr. Green have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed. . . . Where the requisite relationship between person and place exists to warrant state exercise of power and to exclude other states from a conflicting exercise of power would seem to present, at least in connection with a full faith and credit problem, a federal question on which, when properly raised, litigants would be entitled to the judgment of a federal court."

## CONCLUSION.

1. The statute passed by the Legislative Assembly of the Virgin Islands is beyond the power granted by Congress to that body, and is therefore invalid. It is not "of local application," and it exceeds the limits imposed on the Virgin Islands legislature by the due process clause enacted by Congress. This is the simple and adequate ground to dispose of the case.

2. If the statute should be held to be within the powers intended to be delegated by Congress to the Virgin Islands, then much more difficult questions involving the structure of a Federal system are raised. The basic issue, if Congress has undertaken to authorize the passage of the statute, is one of federalism. Is the temporary inconvenience of leaving one's own home for a short sojourn a sufficient basis for the granting of a divorce without reference to the law of the State where the parties really live? It is submitted that the answer to this question, in a Federal system, is readily apparent. Both the Tenth Amendment and the Full Faith and Credit clause inhibit such a power.

The judgment below should be affirmed.

Respectfully submitted,
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January 15, 1955.

## APPENDIX.

### Constitutional and Statutory Provisions Involved.

CONSTITUTION.

Article IV, Section 1 of the Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Section 3, Clause 2 of the Constitution provides in part as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

The Tenth Amendment reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS.

Title 28, U.S.C., sec. 1738 (originally the Act of March 27, 1804, c. 56, sec. 2, Stat. 298, 299), reads as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies

thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The Organic Act of the Virgin Islands of the United States, enacted on June 22, 1936, c. 699, 49 Stat. 1807 (U.S.C., Title 48, secs. 1405r, 1406, 1406g) contains the following provisions:

"Sec. 7. After January 1, 1937, joint sessions of said municipal councils shall constitute and shall be designated the 'Legislative Assembly of the Virgin Islands.' The legislative assembly shall convene in Saint Thomas upon call by the Governor, and also whenever both municipal councils shall determine by resolutions passed by each of them: *Provided*, That the Governor shall call the legislative assembly at least once during each calendar year. The legislative assembly shall have power to enact legislation applicable to the Virgin Islands as a whole, but no legislation shall be considered other than that specified in the message by the Governor calling such a session,

or in both of said resolutions: *Provided further*, That so long as the membership of the legislative assembly does not exceed sixteen members, a quorum of the legislative assembly shall consist of not less than ten members, and no bill shall be enacted until it shall be passed by a two-thirds majority vote of the members present. The municipal councils shall not enact laws or ordinances in conflict with the enactments of the legislative assembly.

. . . . . .

"Sec. 19. The legislative power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to said islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty entered into by the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents.

. . . . . .

"Sec. 34. No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

. . . . . ."

Section 8(a) of the Revised Organic Act of the Virgin Islands, Act of July 22, 1954, 68 Stat. —, reads as follows:

"The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands,

but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents."

VIRGIN ISLANDS LEGISLATION.

Sections 8, 9 and 17 of the Divorce Law of the Virgin Islands, enacted by the Legislative Assembly of the Virgin Islands, approved December 29, 1944, read as follows:

"Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is an inhabitant of the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has been an inhabitant thereof for six weeks prior to the commencement of the action.

"Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plaintiff therein must be an inhabitant of the district at the commencement of the action and for six weeks prior thereto, which residence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose.

. . . . . .

"Section 17. Should any section of this law or part thereof be declared invalid by a Court of competent jurisdiction, said declaration shall not invalidate the remainder of this law."

Section 9(a) of the Divorce Law of the Virgin Islands, added by the Act of the Legislative Assembly of the Virgin Islands approved May 29, 1953, reads as follows:

> "Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."